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INTERSTATE COMMERCE COMMISSION REPORTS

EX PARTE NO. 230 (SUB-NO. 3)

PETITION FOR ENLARGEMENT OF THE AMOUNT OF OPERATIONAL CIRCUITY REDUCTION PERMITTED MOTOR CARRIERS OF PROPERTY UNDER CERTAIN PROVISIONS OF THE TRAILER-ON-FLATCAR SERVICE RULES

Decided August 24, 1976

1. Upon investigation and consideration of views, arguments, and representations of the parties following publication in the Federal Register of a notice of the filing of a petition seeking adoption of a proposed liberalizing modification relating to the amount of operational circuity reduction permitted motor carriers of property under certain provisions of this Commission's trailer-on-flatcar or piggyback service regulations, *Practices of For-Hire Carriers of Property Participating in Trailer-on-Flatcar Service* (49 CFR 1090), such modification adopted.
2. Final environmental impact statement issued.

Harry C. Ames, Jr., and *Marshall Kragen* for petitioners.

Peter T. Beardsley, Nelson J. Cooney, and *Robert L. James* for the American Trucking Associations, Inc.

R. Edwin Brady, Keith G. O'Brien, Roland Rice, and *Richard R. Sigmon* for the Regular Common Carrier Conference of the American Trucking Associations, Inc.

Rebecca W. Hammer and *Sheldon Meyers* for the United States Environmental Protection Agency.

REPORT OF THE COMMISSION

BY THE COMMISSION:

By joint petition filed December 31, 1974, Brown Transport Corp. and Harper Motor Lines, Inc., propose the enlargement of the amount of operational circuity reduction permitted motor carriers utilizing trailer-on-flatcar (TOFC) or piggyback rail service in lieu of their authorized line-haul transportation as prescribed in 49 CFR 1090, *Practices of For-Hire Carriers of Property Participating in Trailer-on-Flatcar Service.*[1] Section 1090.5 of these regulations, which is the so-called 85-percent circuity limitation provision, provides as follows:

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[1] These regulations were promulgated in *Substituted Service—Piggyback*, 322 I.C.C. 301 (1964), affirmed *subnom. American Trucking v. Atchison, T. & S. F. Ry. Co.*, 387 U.S. 397 (1967).

> (a) Motor and water common carriers shall not participate in joint intermodal TOFC service which is to be provided in lieu of their authorized line-haul transportation, and motor and water common and contract carriers shall not utilize open tariff TOFC service, where the distance from origin to destination over the route including the TOFC movement is less than 85 percent of the distance between such points over the motor or water carrier's authorized service route: *Provided, however,* That the Interstate Commerce Commission may grant relief from the provisions of this paragraph upon consideration of an appropriate petition.
>
> (b) For the purpose of paragraph (a) of this section the distance from origin to destination over the motor or water carrier's authorized route shall be computed (1) if a motor carrier operating over regular routes, over its authorized regular service route, (2) if a motor carrier operating over irregular or a combination of regular and irregular routes, through any gateway point which it is required to observe, and (3) if a water carrier, over the most direct available all-water route.

Brown and Harper propose that where the words "85 percent" appear in section 1090.5(a) of the above-noted TOFC service regulations, such words be deleted insofar as they pertain to motor carriers, and the words "80 percent" be substituted in lieu thereof. Petitioners point out that in Ex Parte No. 55 (Sub-No. 8), *Gateway Elimination,* 119 M.C.C. 530 (1974), this Commission adopted procedures (codified at 49 CFR 1065) pursuant to which a motor common carrier of property authorized to provide service from one point to another point by tacking or combining at a common point of service (a "gateway") separate irregular-route authorities (which authorities were issued to the carrier pursuant to an application proceeding, or proceedings, pending before the Commission on or before November 23, 1973), may (subject to certain other specified conditions) file for and obtain direct service operating authority from the one point to the other point, thereby eliminating the necessity of operating through the "gateway," provided that the most direct highway distance between the points to be served is not less than 80 percent of the highway distance between such points over the carrier's authorized routing through the gateway.[2] In this context petitioners contend that the asserted disparity in the amount of circuity reduction permitted in the elimination of such gateways and in the circuity reduction permitted motor carriers under the TOFC service regulations is not justified, and urge that appropriate corresponding modifications in the circuity limitations of the TOFC service regulations be made. Petitioners further assert that their proposed amendment would allow motor carriers to provide improved service, while the minor increase in the permissible circuity reduction would not allow the institution of totally new services.

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[2] Where the most direct route is more than 20 percent shorter than the carrier's authorized routing through the gateway, direct service operations are permitted only when the carrier establishes that the present or future public convenience and necessity require these operations.

In the environmental impact report submitted in conjunction with their joint petition, Brown and Harper state that a grant of the requested relief will have a beneficial impact upon the environment. Petitioners assert that adoption of the recommended change will encourage increased utilization of rail transportation, and that the attendant reduction in the number of highway miles traveled by motor carriers will result in a significant reduction in fuel consumption, an increase in efficiency and economy in the movement of freight, a decrease in the emission of air pollutants, a reduction in traffic congestion, and an improvement in highway safety. The only potentially adverse environmental impact which petitioners foresee is the increase in the number of carriers making use of TOFC service; however, petitioners believe that this potential impact is outweighed in overall effect by the asserted substantial benefits which would follow from adoption of the proposed amendment.

Brown and Harper note four possible alternatives to the proposed action, viz: the Commission could (1) take no action, (2) permit reduction in operational circuity greater than that contemplated under petitioners' so-called "20-percent" circuity reduction proposal, (3) establish the proposed amendment for a limited period of time, or (4) continue to allow greater circuity reduction on a case-by-case procedure in accordance with the provision of section 1090.5(a). Petitioners, however, reject each of these alternatives as inappropriate. Thus, petitioners submit (1) that failure to act would mean forgoing the anticipated beneficial effects upon the environment outlined above, (2) that amendment of the considered provision of the TOFC service regulations to permit significantly greater circuity reduction than that which petitioners proposed would lead to destructive competition and inefficient utilization of equipment, (3) that temporary establishment of the proposed rule change would discourage carriers from making the operational commitments necessary to make full utilization of the new rule, and 4) that processing individual carrier's petitions seeking greater eduction in circuity on a case-by-case basis would discourage motor carriers from attempting to utilize TOFC service, and would not be consonant with the need for expedition in this matter. Petitioners conclude that there will be no irreversible and rretrievable commitments of resources as a result of adoption of

the proposed action; and that, on the contrary such action should result in a better and more efficient utilization of existing resources.

Notice of the filing of the petition was published in the Federal Register on January 24, 1975. The notice provided that any person interested in making representations in favor of, or against, the relief sought in the petition or desiring to comment upon the environmental issues raised by the petition might do so by the submission of written data, views, or arguments on or before March 24, 1975. Pursuant to this notice, representations were submitted by the Regular Common Carrier Conference of American Trucking Associations, Inc. (RCCC), and the U.S. Environmental Protection Agency (EPA).

The proposed modification would not alter the basic framework or the essential regulatory concept underlying the existing TOFC service rules. It would only change the specific percentage limitation relating to operational circuity reduction contained in such provision.

Pursuant to the general rulemaking powers conferred under the Interstate Commerce Act, it is within our regulatory jurisdiction to modify the said provision of the TOFC service regulations in the manner proposed by petitioners, if such modification is shown to be required by the present or future public convenience and necessity in a proceeding where, as made mandatory by 5 U.S.C. 553 (the Administrative Procedure Act), the public has been afforded proper notice of the proposed rule change and an opportunity to participate. Compare the jurisdictional remarks made by this Commission in *Substituted Service—Piggyback, supra,* at pages 321-325.

We believe that the petition raises issues of paramount economic and environmental significance, and, in these premises, under the authority of parts I and II of the Interstate Commerce Act, and particularly sections 12, 204, 206, 207, 208, and 209 thereof, and 5 U.S.C. 553 and 559 (the Administrative Procedure Act), we will consider the proposed rule change and the matters attendant thereto for the purpose of determining whether the present or future public convenience and necessity require the adoption of petitioners' proposed modification and for the purpose of taking such other and further action as the facts and circumstances may justify or require.

The Commission's staff has previously prepared a detailed draft environmental impact statement in this matter in compliance with this Commission's responsibilities pursuant to the National

Environmental Policy Act of 1969, 42 U.S.C § 4321 *et seq.* This draft environmental impact statement was served August 11, 1975, and parties to the proceeding and other interested persons were given the opportunity to comment upon the said statement by the submission of representations on or before September 26, 1975. Comments on the draft environmental impact statement were received from American Trucking Associations, Inc. (ATA), and the RCCC. The comments of these parties, the discussion of these comments, and this Commission's final environmental impact statement in this proceeding are set forth in the appendix to this report.

THE REPRESENTATIONS

The RCCC supports the proposed modification. It agrees with petitioner that there is no operational or competitive justification for the asserted disparity in the amount of circuity reduction permitted motor carriers under the TOFC service regulations and the gateway rules.[3] It observes that both of these regulations are designed to promote economical and efficient operation and to protect existing carriers from the institution of a new service not shown to be required by the public convenience and necessity. The RCCC asserts that the potential impact attendant upon a given percentage of circuity reduction should be comparable under each of the above-noted rules; and that, therefore, the amount of circuity reduction permitted should be equivalent.

The RCCC also agrees with petitioners' position that the proposed rule change would result in increased conservation of energy, protection of the environment, and operating economies and efficiency, without materially altering the competitive balance among existing carriers. The EPA supports the proposed rule change on the basis that emissions of pollutants into the ambient air would be reduced. The EPA asserts, however, that the environmental benefits inherent in the proposed modification would be even greater if the amount of circuity reduction permitted under the

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[3] We note here the recent Commission action in *Enlargement of Operational Circuity Reduction*, 121 M.C.C. 685 (1975), whereby the *Superhighway Rules—Motor Common Carriers of Property*, 49 CFR 1042.3 and *Devision Rules—Motor Common Carriers of Property*, 49 CFR 1042.4, were modified to allow regular-route motor common carriers of property to reduce operational circuity to the same extent (i.e., a 20-percent circuity reduction) permitted irregular-route motor common carriers of property under the regulations promulgated in *Gateway Elimination, supra.*

TOFC service regulations were 25 percent or more, and it urges that appropriate consideration be given to such alternative action.

DISCUSSION AND CONCLUSIONS

The present circuity provision of the TOFC service rules provides, essentially, that carriers (either water or motor) may not utilize TOFC service in lieu of their authorized line-haul transportation where the distance from origin to destination over the route, including the TOFC movement, is less than 85 percent of the distance between these same points over their authorized service routes.[4] This provision places a reasonable limitation on a carrier's ability to reduce the circuity of its authorized line-haul service through utilization of substituted TOFC service, and thus prevents a carrier from instituting a totally new service for which no public need has been established and thereby largely to negate the certificate and permit requirements of the Interstate Commerce Act. See *Substituted Service—Piggyback, supra,* at page 361.

The petitioners request a modification of the circuity provision of the TOFC service rules [49 CFR 1090.5(a)] which would specifically enable those motor carriers of property, which utilize rail TOFC service in lieu of or in substitution of their authorized motor service, to reduce their operational circuities by an additional 5 percent (i.e., an increase in permissible circuity reduction from the present 15 to the proposed 20 percent) under said provision.

We conclude that the proposed modification of the circuity provision of the TOFC service regulations should be adopted. It is apparent that adoption of this modification would have a number of significantly beneficial economic and environmental impacts. Allowing the affected motor carriers to increase their use of rail TOFC service in lieu of their authorized motor service will clearly enable them to effect substantial economies and efficiencies in service which would redound ultimately to the benefit of the public in the form of less expensive transportation service. Moreover, we are persuaded that the increase in permissible circuity reduction involved under the proposed modification will not result in the wholesale creation of essentially new competitive services or material changes in the existing competitive situation.

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[4] The "85-percent" circuity limitation provision of the TOFC service regulations has been interpreted in *Interpretation of Piggyback Service Regulations*, 337 I.C.C. 813 (1970).

Adoption of the proposed rule will substantially benefit the environment. It must be noted that the proposed modification of the circuity provision of the TOFC rules will result in substantial savings in fuel and would thus foster the national goal of fuel conservation, which is a factor of paramount importance in light of the present national and worldwide energy supply uncertainty and high cost. The reduction in operating mileages which will be achieved and, concomitantly, the substitution of locomotive for truck service should result in a significant nationwide decrease in the emission of ambient air pollutants[5] and noise, and will increase highway safety and diminish traffic congestion. We think it highly significant that no opposition has been expressed concerning the proposed rule change. Finally, adoption of the proposed rule change would have the equitable effect of bringing into conformity the TOFC service circuity reduction limitation as to motor carrier users of TOFC service with the circuity reductions recently permitted by the Commission (1) as to operations of irregular-route motor common carriers of property in *Gateway Elimination, supra,* and *(2)* as to operations of regular-route motor common carriers of property in *Enlargement of Operational Circuity Reduction, supra.*

In this vein, we note the request of EPA that we consider whether further liberalization of the circuity provision of the TOFC service rules would be appropriate. We have concluded that, in light of the changing energy needs and economic climate in our Nation, a complete reevaluation of our policies with regard to circuity limitations on TOFC service is now appropriate. However, we do not believe the notice published in the Federal Register in connection with the petition was sufficient to apprise potentially interested parties that such a reevaluation might be undertaken within the context of this proceeding, nor do we believe that the record heretofore developed is sufficient to enable us to reach an informed judgment as to whether or to what extent changes in our current policy may be needed. Accordingly, concurrent with the service of this report we are on our own motion instituting a further rulemaking proceeding to determine whether there continues to be an economic justification for any circuity limitations on TOFC service and, if so, what the limitations should be in light of current economic conditions.

Locomotive diesel emissions are widely acknowledged to be substantially less than those of trucks, as is the relative greater ability of locomotives to transport ton-miles of freight per gallon of fuel consumed. This advantage of the railroads is a result of the lower rolling resistence of steel wheels on steel rails as compared to pneumatic tires on pavement surfaces, and the economies of scale associated with longer trains. See *Increased Freight Rates and Charges, 1972,* 346 I.C.C. 88, 136-143 (1973).

In these circumstances, we conclude that the modification of the TOFC service regulations proposed by Brown and Harper in their jointly filed petition is reasonable and required by the public interest; that such modification should be adopted herein; and that, accordingly, section 1090.5(a) of *Practices of For-Hire Carriers of Property Participating in Trailer-on-Flatcar Service*, 49 CFR 1090, should be modified to read as set forth in the findings below.

FINDINGS

We find that the modification of section 1090.5(a) of *Practices of For-Hire Carriers of Property Participating in Trailer-on-Flatcar Service*, 49 CFR 1090, to read as follows:

> (a) Motor and water common carriers shall not participate in joint intermodal TOFC service which is to be provided in lieu of their authorized line-haul transportation, and motor and water common and contract carriers shall not utilize open tariff TOFC service, where the distance from origin to destination over the route including the TOFC movement (1) is less than 80 percent of the distance between such points over the motor carrier's authorized service route, or (2) is less than 85 percent of the distance between such points over the water carrier's authorized service route: *Provided, however*, That the Interstate Commerce Commission may grant relief from the provisions of this paragraph upon consideration of an appropriate petition.

is reasonable and necessary; and that such modification should be adopted.

An appropriate order will be entered.

COMMISSIONERS MURPHY and HARDIN did not participate.

APPENDIX

SUMMARY

Draft (X) Final Environmental Impact Statement

OFFICE OF PROCEEDINGS, INTERSTATE COMMERCE COMMISSION

1. *Type of action:*
(X) Administrative ( ) Legislative

2. *Description of action:*
By joint petition filed December 31, 1974, Brown Transport Corp. and Harper Motor Lines, Inc., are seeking the institution of rulemaking proceeding to consider the enlargement of the amount of circuity reduction permitted to motor carriers of property under certain provisions of the Commission's Trailer-on-Flatcar Service Rules (49 CFR 1090).

3. *Summary of environmental impacts:*
Approval of the proposed rule change may result in a reduction in the amount of highway miles traveled by motor carriers and a concomitant diversion of freight to more energy efficient rail transport. This would result in a substantial reduction in fuel consumption and slight decreases in air pollution emittants and highway congestion.

4. *Alternatives considered:*
1. No action.
2. Permit more than 20-percent reduction in circuity.
3. Temporary measures.

5. *Comments on the draft environmental impact statement received from:*
American Trucking Association, Inc.
Regular Route Common Carrier Conference of American Trucking Associations, Inc.

I. *Description of the proposal.*

By joint petition filed December 31, 1974, Brown Transport Corp. and Harper Motor Lines, Inc., as pertinent, seek the institution of a rulemaking proceeding to consider the enlargement of the amount of circuity reduction permitted to motor carriers of property under certain provisions of the Commission's Trailer-on-Flatcar Service Rules (49 CFR 1090).

Notice of this proposed rulemaking was made to the general public by publishing a summary of the petition in the Federal Register (January 24, 1975, p. 3787), in which interested parties were invited to make representations in favor of, or against, the relief sought. Comments in support of the proposed rule change have been received from the Regular Common Carrier Conference of the American Trucking Associations, Inc., and the Environmental Protection Agency (EPA).

THE PROPOSED RULE CHANGE

Section 1090.5 of the Commission's *Practices of For-Hire Carriers of Property Participating in Trailer-on-Flatcar Service* (commonly known as the Trailer-on-Flatcar Service Rules), 49 CFR 1090.5, provides as follows:

> SECTION 1090.5 CIRCUITY LIMITATIONS
>
> (a) Motor and water common carriers shall not participate in joint intermodal TOFC service which is to be provided in lieu of their authorized line-haul transportation, and motor and water common and contract carriers shall not utilize open tariff TOFC service, where the distance from origin to destination over the route including the TOFC movement is less than 85 percent of the distance between such points over the motor or water carrier's authorized service route: *Provided, however,* That the Interstate Commerce Commission may grant relief from the provisions of this paragraph upon consideration of an appropriate petition.
>
> (b) For the purpose of paragraph (a) of this section the distance from origin to destination over the motor or water carrier's authorized route shall be computed (1) if a motor carrier operating over regular routes, over its authorized regular service route, (2) if a motor carrier operating over irregular or a combination of regular and irregular routes, through any gateway point which it is required to observe, and (3) if a water carrier, over the most direct available all-water route.

In this proceeding, petitioners seek the institution of a rulemaking proceeding proposing that where the words "85 percent" appear in section 1090.5(a) set forth above, such words be deleted and the words "80 percent" be substituted in lieu thereof insofar as motor carriers are concerned.

BACKGROUND

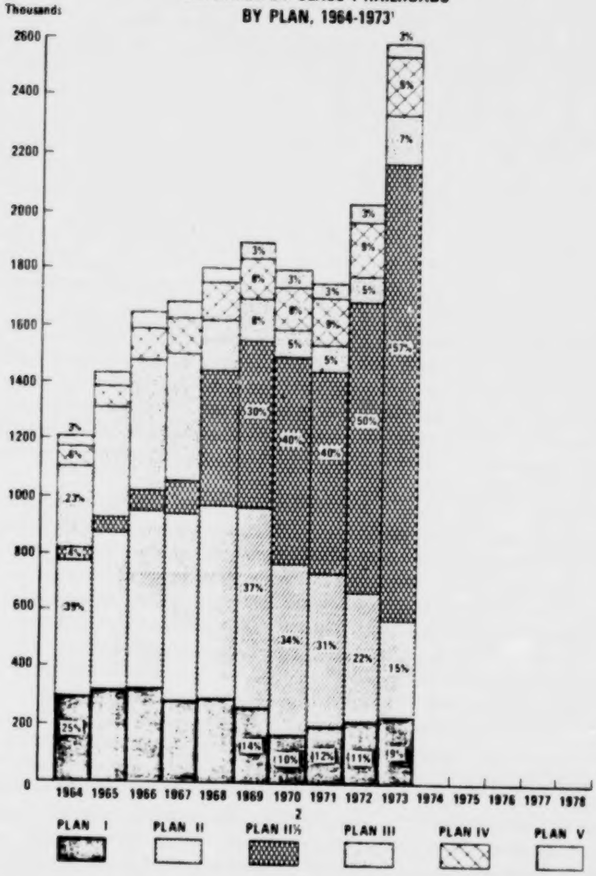
Section 1090.1 of the Trailer-on-Flatcar Service Rules, 49 CFR 1090.1, defines trailer-on-flatcar (TOFC) service as:

> *** the transportation on a rail car, in interstate or foreign commerce, of (a) any freight-laden highway truck, trailer, or semitrailer (or the container portion of any highway truck, trailer, or semitrailer having a demountable chassis) or (b) any empty highway truck, trailer, or semitrailer (or the container portion of any highway truck, trailer, or semitrailer having a demountable chassis) when such empty equipment is being transported incidental to its prior or subsequent use in TOFC service as defined in paragraph (a) of the section.

The use of TOFC (also known as piggyback) service has shown steady growth, the number of piggyback trailer and container terminations reported by class I railroads having more than doubled over the last 10 years (see figure 1). The increasing popularity of TOFC service can be attributed to the fact that it combines the lower costs and greater efficiencies of rail transport with the flexibility and accessibility of motor carriage.

FIGURE 1

**PIGGYBACK TRAILER AND CONTAINER TERMINATIONS
REPORTED BY CLASS I RAILROADS
BY PLAN, 1964-1973[1]**



1. Excludes various other arrangements; in 1973 such exclusions accounted for approximately 5 percent of the total. Revisions in the report form effective July 1, 1972, may have had some influence in the relative plan changes.

2. Includes Plan II½

Source: Bureau of Economics, Statement No. 66-1, Piggyback Traffic Characteristics (1966) and Transport Economics.

SOURCE: *Interstate Commerce Commission. 88th Annual Report to Congress, 1974.*

There are five basic plans generally employed in providing TOFC service. These plans fall, into two categories: joint intermodal and open tariff. Under open tariff piggyback service, the railroad generally deals directly with the shipper or freight forwarder. The railroad may provide all equipment and services from pickup to delivery or only rail equipment and power, depending upon the particular plan utilized. Open tariff plans are generally offered at lower rates than joint intermodal plans and, consequently, accounted for 88 percent of piggyback terminations in 1973 (see figure 1, plans II through IV). It should be noted that motor and water carriers may also avail themselves of open tariff TOFC service.

Joint intermodal TOFC service involves the joint participation by a railroad and a motor or water common carrier in a single line haul. Intermodal piggyback may be provided either in lieu of or in additon to the participating motor or water carrier's authorized service, depending upon the plan employed. However, carriers participating in TOFC service plans may interchange traffic only at common points of service. The shipper may be charged either the applicable motor tariff rate for the entire line haul (which is divided among the participating carriers) or a joint rate for through routes established by the participating carriers.

Under the more commonly used joint intermodal plan, a motor common carrier will solicit traffic at one of its authorized service points and, if the shipper consents, will bring the loaded trailer to a rail loading ramp (located at the same or a different authorized service point) for placement on a rail flatcar (generally one or two trailers are carried on each flatcar). The freight then moves by rail to an unloading point (also served by the motor carrier) where it is unloaded and delivered by the motor carrier to the final destination.

Although TOFC service had its inception in 1926, the Commission did not promulgate regulations governing TOFC practices until 1964. These rules, among other things, restrict the use of piggyback service, when used in lieu of a motor carrier's authorized service route, to those circumstances where the combined TOFC line haul would be no less than 85 percent of the distance traveled over the authorized highway route between the origin and destination points, or, if an irregular-route carrier, the distance traveled by operating through appropriate gateways.[1] The rationale behind the circuity limitation rests upon the concept of intermodal TOFC service as "substituted service." Motor carriers seeking to commence new operations must show that a public need exists for the proposed service. To the extent that it would enable a motor carrier to perform a new service without a showing of public need, permitting indiscriminate substitution of TOFC for motor carrier service would largely negate the Commission's permit and certificate requirements, possibly resulting in destructive competition. To protect against such undesirable consequences, the Commission fixed the permissible circuity reduction from substituted piggyback operations at 15 percent so that TOFC operations would bear a reasonable relationship to the authorized motor carrier service for which they were being substituted. It should be noted that in those cases where the all-highway route would be shorter than the combined TOFC route, the circuity rule would not be applicable.

Petitioners are motor common carriers of general commodities, with exceptions, operating primarily over specified routes in the eastern and southern United States.

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[1] It should be noted that the combining or joining of irregular-route authority after April 5, 1974, has been severely circumscribed by the provisions of *Gateway Elimination*, 119 M.C.C. 530 (1974). Consequently, joint intermodal TOFC circuity limitations will primarily affect regular-route carriers and those carriers combining regular and irregular routes.

They contend that increasing the amount of allowable TOFC circuity reduction to 20 percent will better serve the national transportation policy and Federal energy conservation policies by encouraging wider use of more energy-efficient TOFC service. In this context, petitioners point out that in Ex Parte No. 55 (Sub-No. 8), *Gateway Elimination*, 119 M.C.C. 530 (decided February 15, 1974), the Commission recently adopted procedures (codified at 49 CFR 1065) pursuant to which an irregular-route motor common carrier authorized to provide service from one point to another point by tacking or combining at a common point of service (a "gateway") separate irregular-route authorities (which authorities were issued to the carrier pursuant to an application proceeding, or proceedings, pending before the Commission on or before November 23, 1973), may, subject to certain condition, file for and obtain direct-service operating authority from the one point to the other point, thereby eliminating the necessity of operating through the "gateway," provided that the most direct highway distance between the points to be served is not less than 80 percent of the highway distance between such points over the carrier's authorized routing through the gateway.

Petitioners contend that the asserted disparity in the amount of circuity reduction permitted in the gateway elimination provisions and the amount of circuity reduction permitted motor carriers under the TOFC service rules is not justified, and urge that the TOFC service regulations be modified accordingly. Petitioners assert that their proposed amendment would allow carriers to provide improved service, while the minor increase in permissible circuity reduction would not result in the institution of totally new services which would obtain from the indiscriminate substitution of direct TOFC service for indirect all-motor service.

II. *Environmental impacts of the proposed action.*

It is anticipated that the proposed rule change will result in a beneficial impact on the environment. An increase to 20 percent in the amount of circuity reduction permitted would result in a transit mileage decrease of between 16 and 20 percent of certain line hauls, inasmuch as piggyback service will be available for the first time on those hauls where the mileage over the TOFC route is between 80 and 84 percent less than the mileage over the all-highway route. While it is impossible to ascertain the total number of miles which would be saved if the proposed rule is adopted, it is apparent that a substantial savings would result.[2] Traveling fewer miles to transport the same amount of freight will result in a more efficient use of the Nation's energy resources as well as more efficient use of motor carrier equipment.

Another beneficial impact of the proposed rule change will be the diversion of additional traffic from the highways to the rails. The lower rolling resistance of steel wheels on steel rails, as compared to pneumatic tires on pavement surfaces, and the economies of scale associated with longer trains make railroads a more energy-efficient transport mode than trucks by factors of between 2.5 to 1 and 4 to 1 or more for an equivalent ton-mileage of freight.[3] These energy-efficiency ratio figures are based on intermediate or long-distance intercity movements with train sizes approaching their optimum load factors; therefore, a decline in the distance and capacity of rail shipments will result in a corresponding decline in energy efficiency. In view of the fact that piggyback service is utilized primarily for intermediate or long-distance hauls and the increased use of such service will result in larger trains, the energy efficiencies obtainable from rail transport will be realized close to their full extent.

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[2] Mileage savings, however, would be diminished in those cases where motor carriers travel otherwise unnecessary miles to reach the nearest available railhead.

[3] Numerous studies have been conducted comparing the relative energy efficiencies of various transport modes. Despite the use of different bases, most agree that on the average rail is a more efficient mode than intercity trucks. See, *e.g.*, E. Hirst, *Energy Intensiveness of Passenger and Freight Transport Modes, 1950-1970*, Oak Ridge National Laboratory, April 1973 (energy intensiveness for intercity freight moved by rail was 670 BTU/ton-mile in 1970 compared to 2,800 BTU/TM for intercity truck freight); United States Railway Association, *Preliminary System Plan*, (footnote continued on next page)

The proposed rule will also have a beneficial effect upon air quality. Since there will be fewer highway miles traveled, motor vehicle related emissions will decrease. Total emissions per ton-mile will be reduced due to increased utilization of more efficient rail transportation and higher rail load factors:

Decrease in emissions when utilizing rail[1]

Pounds of emissions per 10^3 ton-miles							
Pollutant	Rail			Diesel truck	Decrease-truck to railroad		
	Light load	Medium load	Heavy load		Light load	Medium load	Heavy load
Carbon monoxide--	1.44	0.59	0.33	4.50	3.06	3.91	4.17
Hydrocarbons -------	1.04	0.42	0.24	0.74	None	0.32	0.50
Nitrogen oxides-----	4.11	1.67	0.93	7.40	3.29	5.73	6.47

[1] Source: Interstate Commerce Commission Reference Manual, *Environmental Threshold Assessment of Proposed Railroad Abandonment Authorizations*, March 1974.

Concomitantly, this reduction in emissions will have a slight beneficial effect on water quality since emissions are eventually washed into the water supply by rainfall. Rainwater is also instrumental in transmitting such highway pollutants as asbestos, rubber, and zinc into storm drains and area streams. The amount of such pollutants left on the highways will diminish as a result of diversion of traffic to railroads, thus slightly decreasing the amount of highway runoff degrading water quality.

A reduction in the number of motor vehicles using the Nation's highways will have a beneficial impact on highway congestion and highway safety. To the extent that fuel efficiency and emissions are partially a function of vehicle speeds, less highway congestion would have a slight beneficial effect on fuel consumption, air pollution, and water pollution. Highway noise levels will also show a minimal decline.

Joint intermodal TOFC service is used primarily by regular-route motor common carriers. Such carriers assume an obligation to serve the overall needs of the shipping public without selectivity as to the freight which is offered. More extensive use of piggyback service will enable regular-route carriers, as well as railroads, to utilize their equipment more efficiently. This will enable the affected rail and motor carriers to become more productive, thus, contributing to a more efficient public transportation system. To the extent the proposed rule change effects a more efficient

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(footnote 3 continued)

Volume I, pp. 147-148 (Rail TOFC operations utilize 5.05 gallons of diesel fuel per 1,000 net ton-miles compared to 13.70 gallons for intercity trucks); Battelle Columbus Laboratories, *Energy Requirements for the Movement of Intercity Freight*, December 1972 (line-haul railroad freight operations require 500 BTU/TM while intercity five-axle heavy-duty diesel trucking operations require 1,800 BTU/TM).

transportation service, shippers will be encouraged to utilize public transportation rather than rely on such private carriage as may be one-directional in volume. The resulting economies of operation may be passed on to the consumer in the form of lower prices for transportation services.

III. *Adverse impacts which cannot be avoided.*

Although it is anticipated that the proposed rule change will generally have a beneficial environmental effect, some adverse impact may result. The potential for derailments and grade crossing accidents will increase due to additional rail traffic. This impact, as well as other safety hazards associated with heightened rail activity, will be offset to a small extent by a concomitant improvement in highway safety. However, accident rates per vehicle mile were higher for class I railroads in 1972 than for intercity motor common carriers.[4]

IV. *Alternatives to the proposed action.*

NO ACTION

The Commission might consider retaining the present "85-percent" circuity test in the TOFC service rules. This is equivalent to a no-action alternative. While such an alternative will have no adverse effect on the environment, maintaining, as it does, the status quo, the anticipated beneficial impact of the proposed rule change in terms of fuel conservation and reductions in air pollutation, water pollution, and traffic congestion will not be realized.

PERMIT MORE THAN A 20-PERCENT REDUCTION IN CIRCUITY

EPA contends that if an increase to 20 percent in the amount of circuity reduction permitted is beneficial, there is no rational basis for concluding that a circuity reduction of up to 25 percent or more would have undersirable consequences. Although it may be true that a greater circuity reduction than that proposed would be even more environmentally beneficial, permitting such reductions may result in adverse economic effects on the motor carrier industry. The regulatory foundation of the transportation industry rests upon a delicate competitive balance assuring a stable environment in which reliable for-hire carriage can invest and grow. The greater the increase in allowable circuity reduction, the greater the adverse effect will be upon existing competitive relationships since a carrier utilizing a significantly shortened route can begin to compete for new traffic in spite of the fact that other carriers may be efficiently and adequately handling such traffic. In view of the fact that NEPA is intended to supplement and not supplant traditional agency regulatory policies and programs, consideration of this alternative must involve weighing its beneficial environmental impacts against the economic consequences of an increase in destructive or harmful competition. In addition, the contemplated environmental benefits of such an alternative may be offset to some extent by the inefficient utilization of motor carrier equipment which would result from new carriers seeking to transport the same amount of traffic as was previously available. This would increase the number of trucks carrying less-than full loads.

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[4] Intercity motor common carriers averaged 3.22 accidents per 10^6 vehicle miles while class I rail carriers averaged 9.65 accidents per 10^6 vehicle units (the sum of locomotive miles, motor train miles, and yard-switching miles). Source: *Accident Facts*, 1973 edition, published by the National Safety Council; *Summary and Analysis of Accidents on Railroads in the U.S.*, 1972, published by the Department of Transportation. It should be noted, however, that an accurate comparison between rail and highway safety is hampered by a lack of uniformity in reporting requirements.

In those circumstances where a circuity reduction in excess of 20 percent will not cause a material change in the existing competitive balance, the TOFC service rules permit the Commission to consider exemptions from circuity limitations upon the filing of an appropriate petition.

TEMPORARY MEASURES

Another alternative which might be considered is to allow the increased circuity reduction for a specified period of time, until current energy problems are alleviated. Although such temporary measures may mitigate the adverse impact on competition, carriers might be unwilling to make the necessary adjustments in schedules and personnel assignments to take advantage of short-term rule changes. Temporary measures are also administratively undesirable since there may be considerable uncertainty regarding the particular point in time at which energy shortages have been sufficiently relieved to permit a return to the "85 percent" standard. Indeed, energy shortages may even be viewed as a permanent problem so pervasive as to demand permanent adjustments in traditional life-styles. If the regulations proposed herein are discovered, at a later date, to be inadequate for any reason, they may be modified accordingly.

V. *The relationship between local short-term uses of the environment and enhancement of long-term productivity.*

The proposed rule change will enable both motor and rail carriers to operate more efficiently by encouraging the optimal use of existing equipment. Long-term productivity will also be enhanced by the conservation of limited fuel supplies. Furthermore, by encouraging wider use of a more efficient and less polluting mode of transportation, the proposed action will result in a beneficial impact on the quality of our environment.

VI. *Any irreversible and irretrievable commitments of resources which would be involved should the proposed action be implemented.*

No irreversible and irretrievable commitments of resources are contemplated. To the contrary, the action under consideration herein should result in a more efficient utilization of existing resources.

VII. *Comments received in response to the draft environmental impact statement.*

The only substantive comment on the draft environmental impact statement (EIS), which was made available to the Council on Environmental Quality and the public on August 11, 1975, was made by American Trucking Associations, Inc. (the Regular Common Carrier Conference of ATA filed a separate comment which adopted the ATA submission). In view of the length of the comment, encompassing 17 pages of text and 28 pages of supporting appendixes, the full text has not been appended to this statement. The submission has, however, been placed in the public docket and thereby made part of the record in this proceeding.

Responses to the ATA comment follow with parenthetical references to the full text of the submission. To the extent practicable, responses are limited to the presence or absence of environmental impacts and reasonable alternatives.

AMERICAN TRUCKING ASSOCIATIONS, INC.

1. *Comment.*—The ton-mileage method for measuring relative modal energy efficiencies is an overly simple, inaccurate standard and its use results in a gross overestimation of the fuel savings available by the substitution of rail TOFC for direct motor carrier services (see comment text, page 2).

Response.—The ton-mileage method is the most widely used technique for measuring relative energy efficiencies. In addition to the studies cited in footnote 3 of the text of the impact statement, this method has been utilized the U.S. Department of Transportation and the Federal Energy Administration. See *Preliminary System Plan,* Vol. 1, p. 148. While the ton mileage technique has its drawbacks (it does not take into account such particular characteristics of individual line hauls as the commodity transported, the length of the haul, or the specific origin and destination points), it is generally perceived as the best means available of providing an accurate overview of modal energy efficiency. Thus, while it is true that trucks may be more energy efficient than trains for moving small volumes over short distances, the energy efficiency ratios utilized in the impact statement are intended to be indicative of the average line haul of several hundred miles.

2. *Comment.*—The ton-mileage approach does not take into account several variables which affect fuel consumption and which must be considered in making proper energy conservation decisions. These include speed, safety, flexibility, size of shipment, type of commodity, shifts of composition of shipment, density, loadability, value of shipment, type of operation, and specific origin and destination points (see comment text, page 4).

Response.—While the above-mentioned factors may enter into a consideration of which mode to utilize for a given individual shipment, they may vary significantly according to the peculiar circumstances of each line haul. Accordingly, they are not particularly useful in determining energy efficiencies for the aggregate of shipments. Inasmuch as this EIS is intended to assess the cumulative impact of the proposed rule change on fuel consumption, use of the ton-mileage method is appropriate in spite of its limitations.

3. *Comment.*—The ton-mile analysis fails to take into account such ancillary services as door-to-door pickup and delivery which may affect relative fuel consumption (see comment text, page 5).

Response.—To the extent that fuel is consumed in moving traffic to and from the railhead in the course of TOFC operations, the fuel savings associated with the diversion from motor carrier to rail may be slightly overstated. The impact statement has been modified to reflect this fact.

4. *Comment.*—Any analysis of fuel efficiencies should be based on actual fuel consumed to move given volumes of goods from their origins to destinations. Blanket assertions that rail fuel economies are universal are not sound when small lot, short distance, or prompt deliveries are demanded by the shipping public (see comment text, page 5).

Response.—The EIS does not purport to state that rail will be more energy efficient than trucks in all instances. Rather, it attempts to present a comparison of the two modes based on aggregating all types of shipments transported. While rail fuel efficiency advantages decline when small lot, short distance shipments are involved, such shipments are not typical of the kind moved in TOFC operations. While prompt delivery may be a factor in the choice of one mode over the other, it has very little to do with relative energy efficiencies.

5. *Comment.*—The Commission stated in its final report in Ex Parte No. 281 that the lack of data in support of the ton-mile method of calculating relative fuel efficiency precluded definitive testing of the conclusion that trains are more efficient than trucks (see comment text, page 6).

Response.—Due to its drawbacks, the ton-mileage method cannot be considered an absolutely definitive indicator of relative modal energy efficiencies. However, its increasing acceptance indicates that there is no better index available for measuring energy efficiencies on a broad basis.

6. *Comments.*—The use of a 4-to-1 efficiency ratio in the draft EIS conflicts with the Commission's finding in Ex Parte No. 281 that the relative modal energy efficiencies appear to be less than 3 to 1 (see comment text, page 7).

Response.—Agreed. Studies conducted subsequent to the Battelle study generally agree that rail is more energy efficient than truck, but by ratios of between approximately 2.5 to 1 and 4 to 1 or more. The EIS has been modified to account for this range in findings.

7. *Comment.*—Approaches other than ton-miles per gallon should be considered by the Commission in determining relative fuel efficiencies among the modes. These approaches yield results showing trucks to be almost as efficient or more efficient than rail (see comment text, page 7).

Response.—In the absence of more detailed information, a more than superficial analysis of the studies cited is not possible. However, it should be noted that the value-of-services method incorporates such variables as economic values and the subjective worth of the service which are not particularly germane to energy efficiency; the International Road Transport Union study does not involve a typical competitive situation and still finds rail more efficient than trucks, albeit by a smaller ratio; the Reebie & Associates study is based on the exceptional terrain of the Los Angeles-Portland corridor and does not purport to represent the typical or average line-haul; and the Boeing study is based on fuel utilization at low densities. Therefore, none of the cited studies is an entirely satisfactory method of calculating fuel efficiencies for typical hauls. Also, see responses to comments 1 and 5.

8. *Comment.*—The air emissions chart used to demonstrate that trucks pollute the air and water more than trains is invalid since it is based on the ton-mile method (see comment text, page 10).

Response.—See responses to comments 1 and 5.

9. *Comment.*—Even if the ton-mile approach is valid, the chart is incorrect in assuming that rail carriers produce fewer emissions as their load increases while trucks produce the same emissions regardless of the load they handle (see comment text, page 11).

Response.—The diesel truck figures in the air emissions chart are based on the average emissions and fuel efficiency of a 40-ton truck operating with close to capacity loads. Rail figures were based on loads of 40 (light), 100 (medium), and 200 (heavy) railcars. Although more energy may be required to move the heavier loads, the large increase in tonnage carried is of such magnitude as to reduce the amount of emissions per ton-mile in spite of this fact.

10. *Comment.*—Based on ATA calculations designed to approximate intercity trucking operating conditions, diesel truck emissions per 10^3 ton-miles are 1.25, 0.25, and 3.25 pounds for carbon monoxide, hydrocarbons, and nitrogen oxides, respectively. Moreover, the best comparison of rail and truck emissions presently available is made in terms of pounds of emissions per 1,000 gallons of fuel burned rather than in terms of pounds of emissions per 1,000 ton-mile (see comment text, page 11).

Response.—The figures presented in the air emissions chart were obtained by combining average emissions data contained in the Environmental Protection Agency's *Compilation of Air Pollution Factors,* 2d Ed., April 1973, with fuel efficiency data derived by the Mitre Corporation from various studies. See Interstate Commerce Commission Reference Manual, *Environmental Threshold Assessment of Proposed Railroad Abandonment Authorizations,* March 1974, p. 5-6. These data were based on nationwide averages and were considered to be the best available figures for the purposes for which they were employed. Admittedly, they may overstate emissions for intercity trucking operations. On the other hand, the ATA computations understate diesel truck emissions for intercity hauls. Although the calculations purport to be based on overall averages, the figures used therein are not. In appendix A of its statement, ATA asserts average horsepower for 1974 to be 350, yet utilizes a 250-horsepower figure in its computations. Inasmuch as the maximum national speed limit is 55 miles per hour, use of this number as an average speed is misleading. Finally, the emissions figures used by ATA are based on EPA data for 1975 vehicles. Inasmuch as such vehicles are generally cleaner than older vehicles, due to age and design, their average fuel emissions will be less than typical.

Comparing truck and rail emissions in terms of pounds of emissions per 1,000 gallons of fuel burned ignores the greater load capabilities and resultant efficiencies inherent in the rail mode. Measured in terms of pounds per 1,000 gallons, the average emissions for both modes are roughly equivalent (emissions of nitrogen oxides are the same while rail emits 95 pounds less carbon monoxide and 75 pounds more hydrocarbons than diesel trucks). However, when one considers the greater rail load potential, trucking operations will emit considerably more pollutants in transporting an equivalent amount of freight.

11. *Comment.*—There is little evidence to substantiate the claim that placing additional truck traffic on the rails will diminish highway pollutants that could affect water quality. Elements in train brake linings and locomotive exhausts will also be washed directly into the waters (see comment text, page 11).

Response.—While an increase in railroad activity may lead to an increase in water pollution due to train residue washing into rivers and streams, this impact should be more than outweighed by a corresponding decrease in the number of trucks on the highways. Residuals from leaded gasolines, asbestos brake linings, and tire rubber from automobile and motor carrier operations have, in fact, been cited as significant aggregate sources of water pollution, inasmuch as surface runoff from rains, in essence, cleanses roads and highways. In any event, the impact on water quality as a result of the proposed action is not expected to be major.

12. *Comments.*—The accident rate comparison in the EIS is misleading insofar as it includes rates for all trucking operations rather than just for intercity common carriers. Furthermore, accurate comparisons between the modes with respect to safety are difficult in view of differing reporting requirements in effect at the time the figures used were compiled (see comment text, page 14).

Response.—Agreed. The EIS has been modified accordingly.

ORDER

TITLE 49 - TRANSPORTATION
CHAPTER X - INTERSTATE COMMERCE COMMISSION
SUBCHAPTER A - GENERAL RULES AND REGULATIONS
PART 1090 - PRACTICES OF FOR-HIRE CARRIERS OF PROPERTY PARTICIPATING IN TRAILER-ON-FLATCAR SERVICE

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D.C., on the 24th day of August 1976.

EX PARTE NO. 230 (SUB-NO. 3)

PETITION FOR ENLARGEMENT OF THE AMOUNT OF OPERATIONAL CIRCUITY REDUCTION PERMITTED MOTOR CARRIERS OF PROPERTY UNDER CERTAIN PROVISIONS OF THE TRAILER-ON-FLATCAR SERVICE RULES

It appearing, That by joint petition filed December 31, 1974, Brown Transport Corp. and Harper Motor Lines, Inc., seek the adoption of a proposed liberalizing modification relating to the amount of circuity reduction permitted motor common carriers under section 1090.5(a) of *Practices of For-Hire Carriers of Property Participating in Trailer-on-Flatcar Service,* 49 CFR 1090;

It further appearing, That pursuant to section 553 of the Administrative Procedure Act (5 U.S.C. 553), notice of the filing of the said petition was published in the Federal Register on January 24, 1975 (40 F.R. 3787); that the notice stated that no oral hearing was contemplated, and persons interested in making representations in favor of, or against, the relief sought in the petition or desiring to comment upon the environmental issues raised by the petition were invited to do so by the submission of written data, views, or arguments; and that, as specified in the attached report, a number of persons have submitted representations in the matter;

And it further appearing, That investigation of the matters and things involved in this proceeding has been made; and that the Commission has made and filed its report herein containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof;

It is ordered, That section 1090.5(a) of *Practices of For-Hire Carriers of Property Participating in Trailer-on-Flatcar Service,* 49 CFR 1090, be, and it is hereby, modified to read as set forth in the attached notice.

It is further ordered, That this order shall become effective on the 60th day following publication of the attached notice in the Federal Register and shall remain in effect until modified or revoked in whole or in part by further order of the Commission.

And it is further ordered, That notice of this order shall be given to the general public by depositing a copy thereof in the Office of the Secretary of the Commission at Washington, D.C., and by filing a copy of the attached notice with the Director, Office of the Federal Register. (49 U.S.C. 12(1); 49 U.S.C. 304(a)(6); 5 U.S.C. 533 and 559.)

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INTERSTATE COMMERCE COMMISSION

TITLE 49 - TRANSPORTATION
CHAPTER X - INTERSTATE COMMERCE COMMISSION
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EX PARTE NO. 230 (SUB-NO. 3)

PETITION FOR ENLARGEMENT OF THE AMOUNT OF OPERATIONAL CIRCUITY REDUCTION PERMITTED MOTOR CARRIERS OF PROPERTY UNDER CERTAIN PROVISIONS OF THE TRAILER-ON-FLATCAR SERVICE RULES

NOTICE OF RULE CHANGE

PURPOSE: The purpose of this document is to notify the public that the ICC has enlarged the amount of operational circuity reduction permitted motor carriers of property under 49 CFR 1090 from 85 percent to 80 percent.

The Interstate Commerce Commission instituted the above-entitled investigatory rulemaking proceeding pursuant to a joint petition filed December 31, 1974, by Brown Transport Corp. and Harper Motor Lines, Inc., which proposed that where the words "85 percent" appear in section 1090.5(a) *Practices of For-Hire Carriers of Property Participating in Trailer-on-Flatcar Service*, 49 CFR 1090, such words be deleted, insofar as such words pertain to motor carriers, and the words "80 percent" be substituted in lieu thereof. Notice of the filing of this section was published in the Federal Register on January 24, 1975 (40 F.R. 3787). The notice provided that any person interested in making representations in favor of, or against, the relief sought in the petition or desiring to comment upon the environmental issues raised by the petition might do so by the submission of written data, views, or arguments on or before March 24, 1975. Representations in the matter were received from the American Trucking Associations, Inc., the Regular Common Carrier Conference of American Trucking Associations, Inc., and the U.S. Environmental Protection Agency.

Upon investigation and consideration of the views, arguments, and representations of the parties, the Interstate Commerce Commission issued a report which adopted the said proposed rule change, finding such change to be reasonable and necessary.

The effect of the adopted modification is basically to enable motor carriers of property to reduce to a greater extent than heretofore allowed the amount of circuity reduction permitted in the utilization of trailer-on-flatcar service in lieu of their authorized line-haul transportation. In stating its specific reasons for adopting the said rule change, the Commission noted that the modification will have a number of significantly beneficial economic and environmental impacts. The Commission found that allowing motor carriers to reduce their line-haul operating mileages to the extent contemplated by the said rule change will enable them to effect substantial overall economies and efficiencies in the services they perform and that such economies and efficiencies will redound ultimately to the benefit of the public in the form of improved and less expensive transportation service. The Commission pointed out that adoption of the said modification will enable the affected carriers to use less fuel in the movement of the subject freight. In this context, the Commission submitted that the reductions in operational circuity contemplated under the new rule will result in a significant nationwide decrease in the emission of air pollutants and noise and will increase highway safety and diminish traffic congestion. In approving the subject rule change, the Commission stated that it deemed it significant that no one had opposed such modification. Finally, the Commission denied a request for further rule change made by the U.S. Environmental Protection Agency concluding generally that such proposed change was not shown to be warranted.

A final environmental impact statement accompanied the report and order, thus fulfilling the Commission's responsibilities pursuant to the National Environmental Policy Act of 1969, 42 U.S.C. §4321 *et seq.*

The above-specified rule change was made under the authority of sections 12(1) and 204(a)(6) of the Interstate Commerce Act (49 U.S.C. 12(1) and 304(a)(6)) and sections 553 and 559 of the Administrative Procedure Act (5 U.S.C. 553 and 559). The effective date of the Commission's order in this proceeding will be the 60th day following publication in the Federal Register of this notice.

Issued in Washington, D.C.

ROBERT L. OSWALD,
Secretary.

Accordingly, pursuant to this action, section 1090.5(a) *Practices of For-Hire Carriers of Property Participating in Trailer-on-Flatcar Service*, 49 CFR 1090, is modified to read as follows:

(a) Motor and water common carriers shall not participate in joint intermodal TOFC service which is to be provided in lieu of their authorized line-haul transportation, and motor and water common and contract carriers shall not utilize open tariff TOFC service, where the distance from origin to destination over the route including the TOFC movement (1) is less than 80 percent of the distance between such points over the motor carrier's authorized service route, or (2) is less than 85 percent of the distance between such points over the water carrier's authorized service route: *Provided, however,* That the Interstate Commerce Commission may grant relief from the provisions of this paragraph upon consideration of an appropriate petition.

No. 35791[1]

GENERAL INCREASE, FEBRUARY 1973, BULK CARRIER CONFERENCE

Decided October 26, 1976

General increases in freight rates found shown to be just, reasonable, and necessary to offset increases in tank truck carrier costs. Proceedings discontinued.

Homer S. Carpenter and *Leonard A. Jaskiewicz* for respondents.

Charles W. Chapman, Richard J. Hardy, and *Stanley Hoffman* for protestants.

Report and Order of the Commission

Division 2, Commissioners Hardin, O'Neal, and Christian

By the Division:

Exceptions to the initial decision of the Administrative Law Judge were filed by respondents, the Bulk Carrier Conference, Inc. (BCC), on behalf of 19 of its members[2] and individually by one of its members, Coastal Tank Lines, Inc. (Coastal), together with Coastal's petition for leave to file its separate exceptions, to which protestants[3] jointly replied. Limited exceptions were also filed by protestants to which respondents replied. Our conclusions differ from those of the Administrative Law Judge. Exceptions and requested findings not specifically discussed in this report and order nor reflected in our findings or conclusions have been considered and found not justified.

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[1] This report and order embraces No. 35791 (Sub-No. 1), General Increase, August 1973, Bulk Carrier Conference.

[2] Bonded Freightways, Inc. (Bonded), Chemical Haulers, Inc. (Chemical Haulers), Chemical Leaman Tank Lines, Inc. (Chemical Leaman), Coastal Tank Lines, Inc. (Coastal), Crossett, Inc. (Crossett), Frontier Delivery, Inc. (Frontier), A. R. Gundry, Inc. (Gundry), Krajack Tank Lines (Krajack), Liquid Transporters Inc. (Transporters), L. P. Transportation, Matlack, Inc. (Matlack), Maxwell Co. (Maxwell), Michigan Transportation (Michigan), P. B. Mutrie Motor Transportation (Mutrie), O'Boyle Tank Lines, Inc. (O'Boyle), Refiners Transport & Terminal Corp. (Refiners), H. R. Ritter Trucking Co. (Ritter), Rogers Cartage Co. (Rogers), Rollo Trucking Co. (Rollo), and Vanguard Transportation (Vanguard).

[3] Air Products & Chemicals, Allied Chemical Corporation, Proctor & Gamble Distrib. Co., Union Carbide Corporation, and Witco Chemical Corporation. (At the public hearing before BCC on September 19, 1971, the Manufacturing Chemists Association, 8 chemical companies, 11 petroleum companies, 3 propane companies, and 1 building products company opposed the proposed February 15, 1973, increase. BCC also held a hearing on June 19, 1973, at which Manufacturing Chemists Association, five chemical manufacturers, and one petroleum company opposed the proposed August 15, 1973, increase. Only the five chemical companies participated in the proceeding before the Commission.)

A procedural matter involved herein, namely: whether Coastal's separate exceptions and replies should be rejected or its petition for leave to file such pleadings should be denied warrants little, if any, consideration in the absence of objection by protestants and because no new issues are raised. Accordingly, the petition for leave to file separate exceptions by Coastal is hereby granted.

In the title proceeding, by schedules filed to become effective February 15, 1973, BCC proposed an "interim" general rate increase of 2 percent for its tank truck hauler members. In the embraced proceeding, BCC filed tariff schedules on behalf of its member carriers proposing a 2-percent general rate increase to become effective August 15, 1973. The increases apply to all transportation performed by BCC carriers, excepting only their cement operations, intrastate and commercial zone operations, and operations in the southwestern part of the United States. Protests were filed opposing both increases by the five protestant chemical companies, but the Commission's Suspension and Fourth Section Board declined to suspend or investigate the proposed schedules in the title and embraced proceedings. Upon appeal, Division 2 of the Commission, Acting as an Appellate Division, instituted investigations into and concerning the lawfulness of the increased rates and charges, and the rules, regulations, and practices affecting such rates and charges contained in said schedules, and all matters and issues with respect thereto, but permitted the increases to become effective. Although presently effective the increased rates will, for convenience of discussion, be referred to herein as proposed increases or proposed increased rates.

The title and embraced proceedings were consolidated for disposition on a single record, and the matter was assigned for oral hearing so that the parties could cross-examine witnesses who submitted verified statements and to afford the opportunity to present evidence in opposition to the cross-examination. Seven days of hearings were subsequently held before an Administrative Law Judge in Washington, D.C. BCC presented evidence prepared by its Chairman of the Cost Committee which is composed of six members, each of whom is employed by member carriers in finance or cost capacities, and by an independent cost analyst. Protestants presented evidence through two witnesses, an independent certified public accountant and a cost consultant.

The Administrative Law Judge found that the proposed general rate increases had not been shown just and reasonable and ordered cancellation of the schedules under investigation. His initial decision was predicated upon the unreliability and lack of support for BCC's revenue and expense evidence. Protestants agree with this finding. However, protestants take exception to the Administrative Law Judge's failure to prescribe guidelines for the future or otherwise to elucidate the evidential standards and minimum proof requirements which caused him to condemn the increases proposed herein. In their exceptions BCC and Coastal contend that the Administrative Law Judge has implicitly and improperly applied evidential standards of the sort prescribed for motor common carriers of general commodities in Ex Parte No. MC-82, *New Procedures in Motor Carrier Rev. Proc.*, 339 I.C.C. 324, 340 I.C.C. 1, and 351 I.C.C. 1 (1975). It is their position that the BCC approach to cost justification represents a sound basis for determining revenue requirements, and that this justification must be judged independently of any Ex Parte No. MC-82 type rules. Yet BCC and Coastal also recognize the need for institution of a rulemaking proceeding to establish procedures to govern the information to be submitted by tank truck carriers in future general rate adjustments.

BCC member carriers provide a specialized service for chemical manufacturing and petroleum companies. These proceedings mark the first formal investigation by the Interstate Commerce Commission into any proposed general increase in rates and charges of these tank truck haulers. The Commission has never required them to conduct continuous traffic studies, to compile statistics on regional costs, to submit unit cost studies in connection with general rate increase proceedings, or to provide the data and information to be submitted by motor common carriers of general commodities such as the Commission prescribed for such carriers in Ex Parte No. MC-82.

The principal issues in these proceedings are whether the increased rates which became effective on February 15, 1973, and August 15, 1973, have been shown by BCC to be just and reasonable under the provisions of the Interstate Commerce Act and necessary to offset increases in tank truck carrier costs.

COSTS

To demonstrate the reasonableness of the proposed increases, BCC submitted cost data and forecasts to measure the overall strength of the tank truck industry. Protestants and BCC further stipulated that the Commission could consider the annual and quarterly reports of 19 of its member carriers filed with the Commission subsequent to the close of the record. Evidence was introduced setting forth the actual cumulative financial picture for said carriers for the base year ending December 31, 1971, which shows net income of $7,586,169 before income taxes. Applying the increases to the traffic handled in 1972 amounts to only $576,102 for the 19 study carriers, and forecasting a 6-percent volume increase, the pro forma net income before taxes is projected to be $9,508,469, resulting in an operating ratio of 94.52 percent. Pro forma revenue and expenses for the year ending December 31, 1973, including the February 15, 1973, 2-percent increase in rates solely on liquid and dry bulk commodities, with an estimated 4-percent increase in volume, was projected to result in net income before taxes of $4,564,026 or a cumulative increase of $995,056, producing an operating ratio of 96.66 percent. For the first two quarters and the first half of the year 1973 BCC introduced evidence of its members' actual "companywide" experience as compared with that for 19 member carriers which is set forth below.

Item	Companywide	BCC interstate
Before rate increases		
Revenue first quarter 1973	$82,281,199	$40,968,437
Revenue second quarter 1973	85,711,476	42,707,628
Revenue first half 1973	[1]167,992,695	83,676,065
Expenses first half 1973	161,881,643	80,624,998
Operating ratio------ (percent)	96.36	96.35
After rate increases		
Revenue first half 1973	172,716,041	[2]85,021,206
Operating ratio------ (percent)	93.73	94.83

[1] Source QFR-1-less $4,633,346 in revenues derived from rate increases.
[2] Includes the 2-percent increase effective February 15, 1973.

BCC conducted a special traffic study requiring each tank truck hauler to submit traffic studies for the year 1972 reflecting gross interstate revenues, mileage and shipment statistics, and a combination of shipment weights and revenues. Fifteen out of the 19 study carriers identified the involved interstate traffic, but 4 carriers were unable to comply with this requirement. Revenues for these four carriers were less than 6 percent of the total gross revenues of the study carriers. Various approaches were taken to develop cost allocating factors, including the use of the Commission's Highway Form F. All four allocating factors were applied by 10 of the study carriers which produced 83.7 percent of the subject revenues. The remaining nine tank truck haulers' costs were calculated through the use of companywide results or revenue only. Three of the allocating methods are set forth in the table below for the base year 1972.

Revenue identification method	Number of carriers	Cost allocating method	Subject revenues	Operating ratio
BCC interstate only	10	Shipments, miles, revenue unit cost factor.	$125,642,969	93.92
Do	5	Revenue only	16,232,358	92.2
Companywide	4	Companywide	8,185,756	97.52
Total	19		150,062,083	93.93

Set forth in appendix A hereto are the total actual operating expenses companywide for 19 study carriers for the first 6 months of 1973 and the interstate portion incurred by each of the BCC carriers, excluding interest costs. Appendix A also reflects the actual revenues for the first and second quarters in 1973, adjusted to show the companywide revenues prior to the rate increases, and the percentage rate increases for BCC interstate versus companywide revenues with BCC interstate revenues and without the effect of the February increase. BCC member carriers sustained an operating ratio of 94.83 percent during the first 6 months of 1973. The actual financial results through the end of 1973 with the involved increases indicates an operating ratio of 94.01 percent as compared with 94.02 for 1972.

Set forth in appendix B is a summary of increased interstate costs incurred by 19 BCC carriers for the year ending December 31, 1973. The summary of increased costs for 1973 is confined to those increased costs which are capable of accurate documentation, and it does not reflect increases in the cost of tires, outside repairs, hoses, cleaning equipment and supplies, insurance, communication, and interest rates in 1973.

For the year 1974, system revenue was computed as $411,061,000 of which $181,732,000 was revenue obtained from handling the traffic involved herein. Revenue derived from increases here under investigation for 18 bulk commodity carriers[4] was $7,269,000. Including the subject increases, operating income for the same period was $27,969,000, as compared with $20,700,000 excluding revenues derived from the increases.

The BCC Cost Committee utilized both hourly and mileage rates in the computation of drivers wages, and second-class mechanics' and tank cleaners' wage rates in its computations and stated separately the cost of health, welfare, and pension funds for each employee class as reflected below.

	Year 1972	Increased Cost 1973	Percent of increase 1973
Wages:			
Mechanics	$6,646,586	$674,863	10.15
Drivers	35,535,657	2,966,711	8.35
Cleaners	1,426,633	151,234	10.60
Total	43,608,876	3,792,808	8.70
HWP:			
Mechanics	780,611	65,434	8.38
Drivers	2,695,004	252,634	9.37
Cleaners	170,800	12,935	7.57
Total	3,646,415	332,003	9.08
Grand total	47,255,291	4,123,811	8.73

Purchased transportation costs through the utilization of leased operators and their equipment accounted for 28.1 percent of total operating expenses of the tank hauler study carriers in 1972, or $51,358,026. Application of the rate increases here in issue necessarily escalated these costs in 1973 by 2.72 percent, or a cost increase of $1,395,129, because the owner-operators are compensated by a percentage of revenue, and they are controlled by the same contract as the lessee carrier. Some unionized leased owner-operators are parties to collective bargaining contracts prescribing wage increases on specified dates, and nonunionized leased operators must maintain close to union pay scales in order to retain and secure qualified drivers. Leased owner-operators have less purchasing power than the carrier lessee and thus must pay a premium price for tractors, maintenance, and insurance.

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[4] Excluding Bonded Freightways, Inc., and Michigan Transportation from the original 20 study carriers because of merger or withdrawal from the proceeding.

BCC has considered the importance of increased costs involved in the replacement of revenue equipment which has a relatively short useful life ranging from 4 to 10 years. Thus, manufacturers' cost increases are quickly reflected in the tank truck haulers' expenses. Each study carrier is required to provide separate summaries for depreciation expense related to tractors and trailers because of their different useful lives. The carriers provide actual monthly depreciation by category of equipment for each of the 24 months involved in the cost study. Greater than normal replacement of equipment occurred in 1972 and 1973 causing increases in costs of 6.44 and 5.81 percent, or increased depreciation costs of $819,053 and $786,650 for the respective years. In 1972 the carriers had undertaken an unusually heavy capital expenditure program caused by their earlier reluctance to commit themselves to extensive financial obligations during the uncertainties that resulted after the recessional period of 1970 and the initiation of economic controls in 1971. Tank truck haulers were compelled to purchase more equipment units in 1972 than would have been necessary on their regular annual replacement cycle, which was further accelerated by exceptional trade-in allowances offered by truck manufacturers due to the market shortage of used trucks. The allegedly exceptional gains realized from these transactions adjusted to reflect actual experience for 1972 applied to BCC carriers' liquid operations were only $1,817,132, whereas they were estimated to be $1,788,543 for the year 1973.

Exclusive of any contract prices that would have become effective during the critical fuel period, BCC projected a conservative increase of approximately 2 cents per gallon for fuel based on data provided by five large member carriers located in different geographic areas.

BCC, as previously noted, confined its consideration of 1973 increased costs to those which were capable of accurate documentation. Expenses excluded represent approximately 23.1 percent of the total operating expenses of BCC carrier members. Among expenses thus excluded from the study are increased cost projections for tires, outside repairs, hoses, cleaning equipment and supplies, insurance, communications, and many other expenses.

BCC did not include the unprecedented increase in the cost of borrowing money since 1972 but did show the effect of such increased costs upon the rate increase required in 1973 as hereinafter indicated.

	Interest expense	Effective rate	1973 increased costs	Rate increase required
		Percent		*Percent*
Year 1972 actual	$5,443,372	6.26	0	0
Year 1973	6,260,747	7.20	$817,375	.26
Year 1973 weighted average	6,904,213	7.94	1,460,841	.47
Prime at August 27, 1973	8,478,095	9.75	3,034,723	.99

Protestants admit that cost increases for labor, purchased transportation, depreciation, taxes, fuel and other expenses have occurred, and BCC's methodology in the determination of such increased costs remains unchallenged. They do contend, however, that the allocation of expenses between affected and nonaffected traffic is erroneous, that some of the study carriers failed to provide any of the data sought by BCC to justify either or both rate increases and others deviated from the allocation formula rendering the results of no value, that BCC tank truck haulers' claimed loss in productivity "appears unusual," that BCC's use of the number of shipments as a divisor for all functions other than maintenance workers and drivers is erroneous, that the assumption that owner-operators experience the same hours per mile as do company drivers is incorrect, that the correct productivity gain is 4.25 percent based on employee hours and ton-miles as reported in the annual reports filed with the Commission by 14 study carriers, and that BCC carriers will continue to realize reasonably substantial profits from the sale of their revenue equipment.

It is the position of BCC that the same procedures have been used consistently over the years to justify the need for past rate increases without any criticism by the Commission and that it has consistently endeavored to improve the method of obtaining data to prove increased costs incurred by its specialized carrier members. BCC refutes the protestants' claim that considerable profits will continue to be experienced from disposal of revenue equipment since the protestants' witness admitted that no analysis was made of this subject. With respect to productivity losses claimed by BCC no rebuttal evidence thereof was introduced by protestants so that its conclusion is unsupported upon the present record. Several apportionment-of-cost factors were applied by BCC in its use of the Commission's Highway Form F which does not provide regional cost allocating factors similar to those for general-commodity carriers; and special supplemental studies must be made to distribute tank cleaning, waste disposal, and other costs. Wages paid for drivers and helpers were distributed solely on the basis of mileage, and administrative and general expenses were allocated on the basis of 50 percent of revenue and 50 percent of the shipments contrary to the allocation in Highway Form F wherein drivers' and helpers' wages are apportioned partly to line-haul and partly to terminal expenses, and administrative and general expenses are assigned to general overhead. BCC correctly states that the Commission has never required tank truck carriers to compile nor submit supplemental statistics in their annual reports, but the costing and financial analysis approach used by BCC has been accepted by the Commission without criticism, ruling, or guidance for many years.

REVENUE NEED

In determining the tank truck haulers' revenue need, BCC shows that the total 4-percent increase in rates during 1973 was justified by virtue of *actual* cost increases approximating 5.1 percent which occurred prior to August 15, 1973. The rate increases are, therefore, within the zone of reasonableness, particularly since a portion of the increased costs must be absorbed by the carriers, as evidenced by the appendixes attached hereto. At the time of the hearing BCC anticipated an increase in its members' operating ratios and projected their actual operating revenue need of $166,837,646 for 1973, based on their 1972 ratio of expenses to revenues. The method of projecting revenue need serves to "pass through" increased costs plus an element of gross profit in proportion to that realized in prior years. An expert witness for BCC introduced evidence of an alternative revenue need computation based on the level of income necessary to insure payment of interest and repayment of principal on the debt portion of the tank haulers' investment base, and to induce creditors to continue their extension of credit at the then existing levels. For 19 of the study carriers in 1972, a net investment base of $68,175,320 was used, 68.19 percent of which is supported by debt. An interest rate of 7.2 percent and a cash throwoff ratio of 32 percent were utilized. The tax rate on income and the investment base, including all owned and leased equipment for these carriers was computed from the 1972 Highway Form A data. Taxes were shown to amount to 18.22 percent. Total net income required is shown as $10,428,070, but without the involved increases, net income would be $3,587,561 less than the amount required for line-haul movement, without giving any consideration to increased costs incurred for other transportation related functions nor the fact that the 2-percent increase effective August 15, 1973, applied for only 4 1/2 months of that year.

BCC introduced an alternative cost allocating factor based on a percentage of revenue to refute protestants' contention that the use thereof is unjustified. This allocation retains the expenses allocated on the service units of miles and shipments, but treats all revenue associated costs as if they were elements of overhead and are distributed in the same relationship as the total dollar expense allocated to the subject traffic on a per-mile and per-shipment basis. With the use of an overhead-type distribution, the change in the subject traffic operating ratio is *de minimis* as shown in the following table.

	Companywide	Subject traffic	Percent of companywide
Revenues	$197,899,017	$125,642,969	63.5
Expense basis:			
Miles	113,583,039	73,823,082	65.0
Shipments	8,251,858	3,434,527	41.6
Subtotal	121,834,897	77,257,609	63.4
Revenues	49,117,943	31,140,775	63.4
Mixed revenue-ship	14,473,709	9,176,332	63.4
Subtotal	63,591,652	40,317,107	63.4
Total	185,426,549	117,574,716	63.4
Operating ratios:			
Restated------(percent)	------------------	93.58	
Original------(percent)	93.78	93.92	

Increased costs for 1973 and subsequent years are admitted by protestants to have occurred, but they contend that BCC has not shown the extent of the increases. However, BCC introduced evidence which was provided by its carrier members to the BCC Cost Committee showing that wages and contractual fringe benefit rates increased substantially in 1973 by virtue of the terms of two principal labor agreements expiring November 1973. Under the Eastern Tank Haul Agreement wage increases during the period of the contract amounted to 45 cents per hour, and pursuant to the provisions of the Central States Agreement wages were increased 63 cents per hour.

Protestants' exceptions to the initial decision by the Administrative Law Judge are addressed principally to his failure to prescribe guidelines or to elucidate the evidential standards and minimum proof requirements to justify the increases involved herein. Set forth in appendix D are suggested interim guidelines for the future which are dependent upon the outcome of an ex parte proceeding to be instituted wherein the relief sought may ultimately be prescribed.

Pursuant to the stipulation by the parties that the Commission could consider the data submitted in the carriers' quarterly and annual reports filed with the Commission in rendering its decision, the first, second, and third quarterly reports and the cumulative statistics for the first 9 months of 1975 are set forth in appendix C. For the first quarter of 1975, 14 of 18 study carriers sustained net losses ranging from $4,000 to $782,000, whereas only 4 carriers had net income ranging from $26,000 to $115,000, or a cumulative net loss of $1,983,000 and an operating ratio of 100.07 percent. For the second quarter of 1975, 5 carriers had net losses ranging from $9,000 to $435,000, 1 carrier had no net income or loss, and 12 carriers had net income ranging from $8,000 to $379,000, or a cumulative total net income of $1,090,000, and operating ratio of 95.3 percent. The third quarter statistics reflect 4 carriers as having net losses ranging from $1,000 to $100,000 and 12 out of 16 study carriers having net income ranging from $15,000 to $777,000, or a cumulative total net income of $2,191,000 and an operating ratio of 93.4 percent. The statistics for Chemical Haulers, Crossett, and Vanguard were excluded from another summary of the financial and operating data submitted by BCC because such data was incomplete. This summary was for 15 bulk carriers reflecting system revenue of $395,295,000, expenses of $375,615,000, and operating income of $19,680,000, resulting in an operating ratio of 95.0 percent, excluding revenues derived from the rate increases under investigation. Applying the subject increases to the affected traffic, the revenue derived therefrom was $7,096,000. Operating revenues for each of the first three quarters[5] of 1975 for 18 carrier members of BCC were $81,097,000, $84,595,000, and $88,190,000, respectively, and operating expenses were $81,150,000,

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[5] Appendix C—only 16 carriers for the third quarter.

$80,600,000, and $82,354,000. The carriers sustained an operating deficit of $53,000 in first quarter of 1975 and cumulative net income after interest expense and taxes of $1,090,000 and $2,191,000 for the second and third quarters, respectively. For the 9-month period in 1975, 7 of the 16 study carriers sustained net losses ranging from $48,000 to $1,317,000, or a total net loss of $1,759,000. The cumulative net income for 16 carriers for this period was $1,361,000, producing an operating ratio of 96.1 percent.

The results of operations for the full year of 1975 for 18 of the study carriers is set forth in the following table, and the cumulative net income for these carriers was $4,320,610 resulting in an average operating ratio of 98.2 percent, which is indicative that specialized tank truck haulers have shown a need for additional revenue to offset increased costs, and we so find and conclude.

Conference carriers	Net income (loss)	Operating ratio
		Percent
Chemical Haulers	$(21,223)	109.0
Chemical Leaman	1,602,410	94.7
Coastal	517,540	95.7
Crossett	127,860	96.4
Frontier	(222,914)	103.1
Gundry	(101,377)	99.7
Krajack	37,213	97.7
Matlack	1,571,876	93.7
Maxwell	203,250	93.9
Michigan[1]	....	....
Mutrie	(1,427,663)	117.4
O'Boyle	(108,062)	98.61
Refiners	1,060,471	92.9
Ritter	22,894	98.1
Rogers	534,756	94.5
Rollo	(91,210)	102.4
L P Transportation	138,406	93.1
Transporters	474,035	95.1
Vanguard	2,348	99.7

[1] The annual report for this carrier is not available at this time.

As further justification for the proposed increases, respondents compared their financial ratios with those of motor carriers of general commodities contending that there is a substantial difference in their capital structures rendering a comparison of returns on shareholders' equity impossible. The proper comparison is alleged to be that of return on total invested capital, which shows that respondents were at a disadvantage to attract needed capital. For example, BCC alleges that the rates of return for 20 member carriers on total invested capital for the 5 years 1968 through 1972 were 9.8, 8.2, 4.7, 8.9, and 10.3 percent respectively, in contrast with the rates of return for class I motor carriers of general commodities which were 9.3, 7.2, 5.2, 12.5, and 12.0 percent for the same period and those for 74 nonregulated industries ratios of 10.3, 9.8, and 8.2 percent for the first 3 years.

The relationship between the cash throwoff to total funded debt for bulk commodity carriers is far below that of the general-commodity carriers. For example, from 1968 through 1971 the ratios experienced by bulk commodity carriers ranged from 27.3 to 33.0 percent whereas such ratios experienced by general-commodity carriers ranged from 47.5 to 74.4 percent. BCC thus contends that its carrier members' ratio has been consistently near the minimum level considered feasible, indicating they have not experienced excessive profits through exorbitant rate increases. Substantial debt and interest expense is alleged to be incurred by bulk carriers which is reflected by their expense ratios as compared with those of general-commodity carriers. For the years 1970, 1971, and 1972 the bulk carriers had expense ratios of 98.5, 96.4, and 95.5 percent, and carriers of general commodities had more favorable ratios of 97.5, 94.0, and 94.2 percent. A comparison of the ratios of times interest earned namely: 1.6, 2.9, and 3.4 times during the same 3 years is stated to indicate the minimum ratio considered adequate by expert financial analysts to sustain bulk carrier operations, whereas general-commodity haulers are in a substantially stronger position in view of the fact that interest earned was 3.2, 8.4, and 8.2 times.

While BCC recognizes the validity of using operating ratios for the purpose of comparing year-to-year financial results of an individual carrier or a consistent sample group, it alleges that operating ratios lose their value if used as a comparative standard between different forms of motor carrier transportation, such as specialized bulk commodity carriers and those handling general freight. Thus, it is contended that the rate of return on total invested capital is the appropriate norm to evaluate the intrinsic profitability of the tank truck hauler industry and not the return on shareholders' equity as claimed by protestants.

BCC states that its member carriers have substantially different capital structures than those of common carriers of general commodities, so that the variance in the capital structure ratios results in a distorted comparison of return on equity ratios between the two groups. For example, this is allegedly shown by a comparison of the debt to equity ratios of 37/63 for general-commodity carriers versus 59/41 for the 20 bulk commodity members of BCC. In attempting to further justify the revenue need of the member carriers, BCC points out that the net investment used by its financial witness was $68,175,320 which was a proper calculation since this amount relates to the investment base of the issue traffic *only*, which had been extracted from the total systemwide base of $127,637,648. Thus, it is alleged to be the only appropriate computation to prove revenue need for its specialized tank truck members. BCC contends that there is no evidence of record to support the use of an effective interest rate of 6.2 percent for the year 1973 since the BCC witness did not use facts for the year 1973 but rather 1972 predicated upon an actual base rate of 7.2 percent. The weighted average interest rate for 1973 was shown to be 7.94 percent so that the 7.2 percent used by the BCC witness was allegedly conservative. Two expert financial analysts presented testimony that the cash throwoff ratio for the motor carrier industry is ample at 30 percent, and when it is between 35 and 40 percent, it is strong. The evidence of record with respect to the actual results for 1973 is stated to produce a ratio of 29.35 percent rather than the use of an arbitrary and unsupported ratio of 32 percent. BCC contends that the Commission's adoption of its position that deferred income taxes and debt due within 1 year as includable in the determination of the working capital ratio constitutes an awareness of the effect of these considerations on determinations of financial returns. For example, tax policies relating to investment tax credit and accelerated depreciation methods have resulted in tax rates as low as 18.22 percent which is far below the standard corporate rate of 48 percent. BCC introduced evidence indicating the financial ratios for 20 of its member carriers for 3 successive years for the purpose of refuting protestants' contention that the adequacy of earnings in 1973 would be in excess of those in 1972 as reflected below.

	1973	1972	1971
Operating ratio	94.01	94.02	94.47
Current ratio (before the inclusion of current maturities)	1.92	2.03	2.01
Ratio of net income to operating revenue	2.77	3.63	2.79
Rate of return on owned and leased operating property and working capital	15.13	14.46	13.58
Rate of return on shareholders' equity less intangibles	16.63	21.90	17.95
Throwoff to debt ratio	29.38	32.96	32.98
Expense ratio	96.00	95.50	96.40

Since 1973 was the year during which the contested rate increases were in effect, BCC contends its members did not experience any improvement in their financial position as a result thereof.

While respondents' evidence of further justification for the proposed increases relates to prior years which would ordinarily be considered too remote to be of value today, when evaluated and compared with the financial trends of subsequent years as heretofore set forth, we believe this evidence also establishes a prima facie showing on this record of the need for increased revenues which has not been rebutted by the protestants, and we so find and conclude.

AFFILIATE RELATIONSHIPS

BCC requested the cost study carriers to provide information with respect to the financial impact of the profits or losses of their affiliates on the revenues from carrier operations. Sixteen of the 19 carriers reported affiliate data, 3 carriers having no affiliates. Services provided by affiliates consist of the leasing of equipment and terminal properties, providing maintenance services, and other services related to their specialized common carrier operations. The basis issue with respect hereto is whether the transactions between the carriers and their affiliates have a "significant impact" affecting these specialized carriers' earnings. BCC contends that such an impact is insignifcant as reflected by the following table.

Company	Paid to affiliate	Received from affiliate	Net transactions
Coastal	$106,362	$126,259	($19,897)
Liquid Transporters	431,942	133,200	298,742
Frontier	826,436	7,200	819,236
O'Boyle	10,072	119,959	(109,887)
Vanguard	310,963		310,963
A. R. Gundry	15,910		15,910
Maxwell	28,800		28,800
Refiner	210,297		210,297
L. P. Transportation	333,418		333,418
P. B. Mutrie	449,176	399,843	49,333
Bonded	730,894	59,001	671,893
Matlack	1,409,470	899,673	509,797
Ritter	58,154	14,323	43,831
Michigan	385,704	174,839	210,865
Chemical Leaman	799,353	1,304,711	(505,358)
Total	6,106,951	3,239,008	2,867,943
Net affiliate transactions			2,867,943
Total gross revenues—1971			278,286,428
Affiliate transactions as percentage of total BCC carriers revenue			1.03

Although protestants' witness stated that he had never been furnished with access to material to make a meaningful analysis of the impact of affiliate data, he admitted that no request for such information was made since "some time prior to July 1973." Protestants claim that bulk carriers' use of leased equipment without drivers is the primary possibility for siphoning off profits from the carriers. Thus, since such a condition exists for general-commodity carriers, it is equally applicable to specialized haulers of bulk commodities. On the other hand, BCC indicates that the ratios of vehicle miles leased without drivers to total vehicle miles for BCC carriers were 8.90 and 10.24 percent for the years 1971 and 1972 respectively, whereas comparable ratios for the same periods for general-commodity carriers were 19.96 and 20.97 percent. For the year ending December 31, 1972, total companywide gross revenue for the 16 carriers reporting affiliate data was $300,866,092 and total expenses were $282,198,306, producing an operating ratio of 93.80 percent. Total carrier affiliate revenue was $5,994,200 and expenses were $5,419,957, or income of $574,243. This resulted in an operating ratio for the affiliates of 90.42 percent. Total carrier revenues plus that of the affiliate were $306,860,292 and expenses of $287,618,263 producing an operating ratio of 93.73 percent. Thus, the effect of the affiliates' income on the carriers' operating ratio is to improve it by .07 percent. We therefore find and conclude that the transactions between the carriers and their affiliates did not have a significant impact upon the carriers' earnings.

Transactions between BCC study carriers and companies or persons affiliated therewith, for services provided by the latter, included payments by Chemical Leaman to Chemical Leasing Corporation and Tank Service Co. for building rental, revenue equipment rents, and equipment sales during 1975 amounting to $418,582, $90,383, and a loss of ($224,322), respectively. The purchase of vehicle parts from Tank Service Co. resulted in no gain or loss since the purchase price was at net book value. Chemical Leaman had no transactions with three of its other affiliates, Ryder Tank Lines of Va., Inc., Chemical Leaman Tank Lines, Inc., of Illinois, and Despatis Transport Limited.

One affiliate of Coastal, Coastal Industries, Inc., was reimbursed for actual expenses incurred amounting to $60,000, $61,834 for the lease of an office building, and $60,000 for the actual expense incurred in the lease of a distinct operating unit. Actual expenses paid to another affiliate, Leaseway, Inc., for data processing were $384,917.

Frontier has five partially owned affiliates, namely: Amelia M. Moran, Inc., which provided commercial insurance coverage costing $148,819.67; Division Tire & Auto Parts, Inc., supplying tires and parts at prevailing market prices or lower for $60,215; Erie Truck Sales & Supply Co., Inc., which sold tractors and trailers to Frontier during 1975 for $23,845.80; Moran Leasing Co., Inc., from which revenue equipment was leased for $109,112.18; and Western Trading Corp., from which Frontier leased a terminal building and yard on a basis of month-to-month occupancy for $27,000.

Matlack has 11 affiliated companies which provide a variety of services which are reflected in the following table.

Company	Character of service	Total charge for 1975
1 R L C Corp	Federal income tax	$1,134,101
2 do	Insurance department management fee	109,050
3 E. Brook Matlack, Inc., of Va	Management fee	20,889
4 Southern Tank Lines, Inc	do	208,000
5 do	Lease of vehicles	425,649
6 T. I. McCormack Tkg. Co	do	13,847

	Company	Character of service	Total charge for 1975
7	Super Service, Inc	Lease of land and building	$102,520
8	do	Lease of vehicles	287,534
9	do	Repair of revenue equipment	102,556
10	Rollins Terminal	Lease of land	10,600
11	do	Management fee	7,500
12	do	Labor	66,710
13	Rollins Auto Leasing	Leasing of cars	167,050
14	Rollins Leasing	Maintenance of revenue equipment	13,614
15	do	Fuel purchases	328,036
16	Rollins Properties	Lease of terminal	512,605
17	Commodity Carrier	Sale of commodity carriers	10,000
18	Rollins Environmental Services	Lease of vehicles	109,348

Mutrie's maintenance service was provided by its affiliate, Mutrie Truck Rental, Incorporated, at a cost of $231,315.

O'Boyle's affiliate, Berkeley Equipment Company, leases equipment for $27,098, but O'Boyle pays the affiliate's maintenance and license fees. The total charges by the affiliate for the lease of vehicles was $11,890, and the amount expended for the terminal lease and home office was $63,795. Property and equipment purchases amounted to $53,600, and the rental of a storage bin cost O'Boyle $8,133.

Refiners had three affiliates in 1975, namely: Leaseway Transportation Corp., which was paid $232,346 for salaries, directors fees, and computer services; Allied Truck Parts received $338,000 for automotive parts and equipment; and Southway Tire Company was paid $331,000 for tire recapping services and $22,500 for tires purchased.

Rollo's affiliate, Ralou Transportation, Inc., received $1,800 for equipment rental for 1975.

L. P. Transportation's affiliate, Palmer Transportation, Inc., was paid $60,617 for tires and/or tubes, $106,697 for fuel, $7,982 for oil, $337,122 for vehicle maintenance, and $30,349 for management service. A second affiliate, Van Rompye Trucking Corp., received $16,494 for vehicle leasing.

Vanguard's affiliate, Vanguard Transportation, Inc., of New Jersey, leases vehicles to Vanguard on an annual basis, and for 1975 the total charges for the year were $167,678. The other affiliate of Vanguard, Gateway Terminal Service Corp., provided a payroll service at a cost of $126,281 for the same period and sold tires to its parent for $3,220.

Transporters paid $79,689 to its wholly owned subsidiaries, including $31,639 paid to LTL Leasing, Inc., for equipment rentals, and $48,050 to Liquid Terminals, Inc., for real estate rentals.

Chemical Haulers indicated that it had two affiliates, but did not show that it had any transactions with them during 1975.

The individual and cumulative effect of the amounts paid during 1975 by the carriers to their affiliates for services and for materials and supplies is set forth in the following table.

Year 1975

Carrier	Operating revenues	Operating expenses	Paid to affiliates
1 Bonded	unknown	unknown	unknown
2 Chemical Haulers	$1,635,347	$1,656,783	none
3 Chemical Leaman	90,087,307	85,271,058	$185,845
4 Coastal	41,236,243	39,450,284	566,751
5 Crossett	4,436,007	4,274,924	none
6 Frontier	4,538,963	4,677,463	368,992.65
7 Gundry	6,631,666	6,611,113	none
8 Krajack	2,949,093	2,881,688	none
9 L. P. Transportation	3,488,805	3,249,363	559,261
10 Transporters	9,574,114	9,100,079	79,689
11 Matlack	82,607,646	77,411,114	3,629,509
12 Maxwell	5,446,686	5,114,522	none
13 Mutrie	8,535,674	10,024,859	231,315
14 O'Boyle	11,193,913	11,038,004	164,516
15 Refiners	41,345,250	38,395,512	923,846
16 Ritter	4,175,515	4,096,073	none
17 Rogers	21,561,572	20,394,484	none
18 Rollo			1,800
19 Vanguard			297,179
Total	342,352,058	328,580,530	7,008,703.65
Affiliates' transactions—percent of carrier revenues			2.0

We further find and conclude that the payments made during 1975 by the tank truck haulers to their affiliates for transportation properties, supplies, and services did not have a significant impact upon the carriers' earnings.

SUMMARY FINDINGS AND CONCLUSIONS

The Bulk Carrier Conference, Inc., was organized by specialized common carriers of liquid and dry bulk commodities approximately 19 years ago when the Commission approved the agreement between and among said carriers in *Eastern Tank Carriers—Agreement,* 301 I.C.C. 359 (1957). This agreement provided for the procedures for the joint consideration, initiation, or establishment of rates, ratings, rules, regulations, classifications, and practices applicable to the transportation of commodities in bulk, in tank vehicles, in interstate or foreign commerce, between points in specified areas within the United States and to and from points within Canada. Because of the specialized nature of its members' services, the number of participating carriers is relatively small. Thus, BCC has been unable to employ a resident cost staff or establish an economics or data processing department which have been established by the large general-commodity rate bureaus. Furthermore, the Commission has never heretofore required BCC or its members to conduct continuous traffic studies, compile statistics on regional costs, or to submit unit cost studies in connection with any prior rate increases established over this long span of years, nor has the Commission ever questioned the lawfulness of such increases in rates established by BCC for its members until the institution of this proceeding in February 1973. On the other hand, the Commission has expressly recognized that the procedures adopted in *New Procedures in Motor Carrier Rev. Proc.,* 339 I.C.C. 324, 331; 340 I.C.C. 1, 5, should not be required of all types of carriers, such as specialized carriers of particular commodities, since they do not ordinarily provide the necessary data and information to comply with the requirement for separation of certain of their expenses, in their accounting and reporting to this Commission, between line-haul and pickup and delivery services.

Upon consideration of the entire record herein, including the briefs of the parties and their stipulation that we could consider data submitted by the carriers in their quarterly and annual reports filed with the Commission subsequent to the close of the hearing in rendering our decision, we find and conclude that tank truck carriers are in need of additional revenue from their interstate freight rates and charges to offset increased operating costs and to provide an improved level of earnings.

We further find and conclude that the tariff schedules under investigation herein are just, reasonable, and otherwise lawful.

And we further find and conclude that this decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

It is ordered, That the proceedings be, and they are hereby, discontinued.

APPENDIX A

BULK CARRIER CONFERENCE, INC.

Separation of expenses between BCC interstate and all other

Line No.	Carrier (1)	Total expenses first half 1973[1] (2)	Allocation to BCC interstate (3)	BCC interstate portion of total expense (4)
			Percent	
1.	Bonded Freightways	$2,270,499	11.01	$249,982
2.	Chemical Haulers	911,641	100.00	911,641
3.	Chemical Leaman Tank	47,902,683	56.19	26,916,518
4.	Coastal Tank Lines	12,989,170	71.45	9,280,762
5.	Crossett Tank Lines	1,658,824	31.63	524,686
6.	Frontier Delivery	2,395,462	22.96	549,998
7.	A. R. Gundry	2,614,840	2.60	67,986
8.	Krajack Tank Lines	1,896,999	100.00	1,896,999
9.	L. P. Transportation	1,640,506	48.81	800,731
10.	Liquid Transporters	4,706,022	34.99	1,646,637
11.	Matlack, Inc.	37,271,435	39.12	14,580,585
12.	Maxwell, The	2,065,118	51.17	1,056,721
13.	P. B. Mutrie Motor	6,610,248	49.43	3,267,446
14.	O'Boyle Tank Lines	6,112,328	51.23	3,131,346
15.	Refiners Transp. & Term	16,224,554	32.36	5,250,266
16.	H. R. Ritter Trucking	2,022,177	61.76	1,248,897
17.	Rogers Cartage	10,903,976	69.32	7,558,636
18.	Rollo Trucking Corp.	607,108	100.00	607,108
19.	Vanguard	1,078,053	100.00	1,078,053
20.	Total 19 carriers	161,881,643		80,624,998

[1] Source QFR-1.

BULK CARRIER CONFERENCE, INC.—Continued

First quarter actual 1973 revenues adjusted to show effect prior to rate increases

Line No.	Carrier	Actual 1st quarter revenue from QFR	Allocation		Rate increase effect			Companywide revenue prior to rate increases	BCC interstate revenue without effect of Feb. 15, 1973 increase
			BCC interstate	All other	BCC interstate increase[1]	All other increase[2]	Companywide rate increase		
	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)
			percent	*percent*	*percent*	*percent*	*percent*		
1	Bonded	$1,136,944	11.3	88.7	0.11	3.54	3.65	$1,096,907	$123,950
2	Chemical Haulers	472,319	100.0	0	1.00	----------	1.00	467,643	467,643
3	Chemical Leaman	24,902,438	55.7	44.3	0.56	1.77	2.33	24,335,423	13,554,831
4	Coastal	6,765,754	73.2	26.8	0.73	1.07	1.80	6,646,124	4,864,963
5	Crossett	996,660	30.3	69.7	0.30	2.79	3.09	966,786	292,936
6	Frontier	1,289,291	22.2	77.8	0.22	3.11	3.33	1,247,741	276,999
7	Gundry	1,471,065	2.6	97.4	0.03	3.90	3.93	1,415,438	36,801
8	Krajack	1,016,496	100.0	0	1.00	----------	1.00	1,006,432	1,006,432
9	Transportation	1,404,215	48.0	52.0	0.48	2.08	2.56	1,369,164	657,199
10	Transporters	2,330,231	35.0	65.0	0.35	2.60	2.95	2,263,459	792,211
11	Matlack	19,426,035	38.9	61.1	0.39	2.44	2.83	18,891,408	7,348,758
12	Maxwell	1,086,834	50.9	49.1	0.51	1.96	2.47	1,060,636	539,864
13	Mutrie	2,886,215	54.3	45.7	0.54	1.83	2.37	2,819,395	1,530,931
14	O'Boyle	3,032,080	50.7	49.3	0.51	1.97	2.48	2,958,704	1,500,063
15	Refiners	8,558,280	32.4	67.6	0.32	2.70	3.02	8,307,397	2,691,597
16	Ritter	1,192,914	61.8	38.2	0.62	1.53	2.15	1,167,806	721,704
17	Rogers	5,499,412	68.5	31.5	0.69	1.26	1.95	5,394,225	3,695,044
18	Rollo	314,420	100.0	0	1.00	----------	1.00	311,307	311,307
19	Vanguard	560,756	100.0	0	1.00	----------	1.00	555,204	555,204
20	Total 19 carriers	84,342,359	----------	----------	----------	----------	----------	82,281,199	40,968,437

Col. 3 x 1 percent which represents the impact of the 2-percent increase in effect from February 15, 1973.

Col. 4 x 4 percent which represents increases in effect for 1973.

BULK CARRIER CONFERENCE, INC.—Continued

Second quarter actual 1973 revenues adjusted to show effect prior to rate increases

Line No.	Carrier	Actual 2nd quarter revenue from QFR	Allocation		Rate increase effect			Companywide revenue prior to rate increases	BCC interstate revenue without effect of Feb. 15, 1973 increase
			BCC interstate	All other	BCC interstate increase[1]	All other increase[2]	Companywide rate increase		
	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)
			percent	*percent*	*percent*	*percent*	*percent*		
1	Bonded	$1,149,294	11.3	88.7	0.22	3.54	3.76	$1,107,646	$125,164
2	Chemical Haulers	480,998	100.0	----------	2.00	----------	2.00	471,566	471,566
3	Chemical Leaman	26,079,151	55.7	44.3	1.11	1.77	2.88	25,349,097	14,119,477
4	Coastal	7,161,153	73.2	26.8	1.46	1.07	2.53	6,984,446	5,112,614
5	Crossett	1,052,056	30.3	69.7	0.61	2.79	3.40	1,017,462	308,291
6	Frontier	1,252,545	22.2	77.8	0.44	3.11	3.55	1,209,604	268,532
7	Gundry	1,354,337	2.6	97.4	0.05	3.89	3.94	1,302,999	33,877
8	Krajack	1,002,350	100.0	----------	2.00	----------	2.00	982,696	982,696
9	Transportation	504,627	48.0	52.0	0.96	2.08	3.04	489,738	235,075
10	Transport EPS	2,869,346	35.0	65.0	0.70	2.60	3.30	2,777,682	972,189
11	Matlack	20,953,515	38.9	61.1	0.78	2.44	3.22	20,299,860	7,896,646
12	Maxwell, The	1,213,247	50.9	49.1	1.02	1.96	2.98	1,178,138	599,672
13	Mutrie	3,152,143	54.3	45.7	1.09	1.83	2.92	3,062,712	1,663,053
14	O'Boyle	3,156,499	50.7	49.3	1.01	1.97	2.98	3,065,157	1,554,035
15	Refiners	8,803,945	32.4	67.6	0.65	2.70	3.35	8,518,572	2,760,017
16	Ritter	1,040,983	61.8	38.2	1.24	1.53	2.77	1,012,925	625,988
17	Rogers	6,200,347	68.5	31.5	1.37	1.26	2.63	6,041,457	4,138,397
18	Rollo	325,053	100.0	----------	2.00	----------	2.00	318,679	318,679
19	Vanguard	532,093	100.0	----------	2.00	----------	2.00	521,660	521,660
20	Total 19 carriers	88,283,682	----------	----------	----------	----------	----------	85,711,496	42,707,628

[1] Col. 3 x 2 percent which represents the impact of the 2-percent increase in effect from February 15, 1973.

[2] Col. 4 x 4 percent which represents increases in effect for all of 1973.

APPENDIX B

Summary of increased costs—BCC interstate only
19 carriers year ending December 31, 1973

	Base year 1972	Percentage increase 1973	Increased costs 1973
		Percent	
Maintenance:			
Wages-supervision	$1,089,468	5.50	$59,921
Wages-mechanics	6,646,586	10.15	674,863
Health, welfare, pension	780,611	8.38	65,434
Total			800,218
Transportation:			
Wages-supervision	2,753,234	5.50	151,427
Wages-drivers	35,535,657	8.35	2,966,711
Wages-cleaners	1,426,633	10.60	151,234
HWP-drivers	2,695,004	9.37	252,634
HWP-cleaners	170,800	7.57	12,935
Holidays and vacation	2,394	10.40	249
Purchased transportation	39,664,201	2.72	1,080,602
Fuel	3,758,308	16.49	619,745
Total			5,235,537
Traffic and sales:			
Wages-supervision	716,660	5.50	39,416
Insurance and safety:			
Wages-supervision	362,486	5.50	19,937
Administration and general:			
Wages-supervision	2,842,340	5.50	156,329
Depreciation	9,149,977	6.58	602,067
Depreciation adjustment	(1,060,196)	12.69	(134,572)
Taxes and licenses:			
Social security	1,970,367	26.23	516,888
Total increase in costs—1973			7,235,820

APPENDIX C

1975 first quarter operating statistics (all numbers in thousands)

Conference carriers	Operating revenues	Operating expenses	Net carrier operating income	Interest	Ordinary income before taxes	Net income
Chemical haulers	$312	$363	$(51)	54	$(55)	$(55)
Chemical Leaman	19,707	20,036	(329)	781	(1,044)	(425)
Coastal	10,482	10,286	196	359	(98)	(29)
Crossett	1,240	1,079	161	-0-	164	83
Frontier	1,248	1,313	(65)	26	(91)	(91)
Gundry	1,578	1,603	(25)	45	(60)	(60)
Krajack	609	615	(6)	1	(5)	(5)
Transporters	2,110	2,049	61	12	82	45
Matlack	19,988	19,624	364	780	(396)	(263)
Maxwell	1,211	1,196	15	-0-	(4)	(4)
Michigan	1,600	1,721	(121)	39	(141)	(141)
Mutrie	1,954	2,595	(641)	119	(736)	(782)
O'Boyle	2,441	2,629	(188)	42	(228)	(228)
Refiners	10,058	9,506	552	325	250	115
Ritter	1,057	1,011	46	18	26	26
Rogers	4,831	4,827	4	126	(123)	(123)
Rollo	223	242	(19)	19	(38)	(38)
Vanguard	448	455	(7)	5	(8)	(8)
Total	81,097	81,150	(53)	2,701	(2,505)	(1,983)
Operating ratio—percent	100.0					

Loss ( )

Source: Form QFR quarterly report 1st quarter 1975

APPENDIX C

1975 2d quarter statistic (000's of dollars)

Bulk carriers	Operating revenues	Operating expenses	Net carrier operating income	Interest expense	Ordinary income before taxes	Net income
Chemical Haulers	$396	$384	$12	$4	$8	$8
Chemical Leaman	22,271	20,960	1,311	657	669	379
Coastal	9,938	9,582	356	290	91	33
Crossett	1,074	956	118	0	119	53
Frontier	1,060	1,106	(46)	20	(66)	(66)
Gundry	1,544	1,598	(54)	48	(102)	(102)
Krajack	658	644	14	1	13	12
Transporters	2,659	2,457	202	6	223	126
Matlack	19,474	18,481	993	660	395	261
Maxwell	1,361	1,257	104	0	97	48
Michigan	1,895	1,839	56	38	32	32
Mutrie	2,334	2,784	(450)	85	(585)	(435)
O'Boyle	2,801	2,543	258	65	194	194
Refiners	10,126	9,379	747	295	467	332
Ritter	955	951	4	13	(9)	(9)
Rogers	5,356	4,972	384	121	263	256
Rollo	224	238	(14)	17	(32)	(32)
Vanguard	469	469	0	4	0	0
Totals	84,595	80,600	3,995	2,324	1,777	1,090
Operating ratio--percent	95.3	-----	-----	-----	-----	-----

Loss ( )
Source ICC's Form QFR

1975 3d quarter statistics (000's of dollars)

Bulk carriers	Operating revenues	Operating expenses	Net carrier operating income	Interest expense	Ordinary income before taxes	Net income	Net income nine-month statistics
Chemical Haulers	$481	$492	$(11)	$5	$(16)	$(16)	$(63)
Chemical Leaman	22,901	21,397	1,504	622	911	519	473
Coastal	10,210	9,530	680	286	432	182	186
Crossett	992	889	103	0	103	45	181
Frontier	1,155	1,169	(14)	20	(34)	(34)	(191)
Gundry	1,808	1,738	70	49	22	22	(140)
Krajack[1]	-----	-----	-----	-----	-----	-----	-----
Transporters	2,438	2,274	164	6	197	102	273
Matlack	21,423	19,525	1,898	672	1,311	777	775
Maxwell	1,453	1,320	133	0	126	63	107
Michigan	2,373	2,309	64	37	56	61	(48)
Mutrie	2,298	2,471	(173)	81	(230)	(100)	(1,317)
O'Boyle	2,998	2,787	211	87	103	99	65
Refiners	10,369	9,710	659	293	387	213	660
Ritter	927	918	9	10	(1)	(1)	16
Rogers	5,823	5,300	523	118	405	244	377
Rollo[1]	-----	-----	-----	-----	-----	-----	-----
Vanguard	541	525	16	4	15	15	7
Totals	88,190	82,354	5,836	2,290	3,787	2,191	1,361
Operating ratio—percent	93.4	-----	-----	-----	-----	-----	96.1

[1] Krajack and Rollo statistics not available now.

Loss ( )

Source: ICC's Form QFR.

APPENDIX D

Interim guidelines in Bulk Carrier rate increase proceedings

1. *Application.*—(a) Upon the filing by tariff publishing agencies on behalf of their notor common carriers of liquid and dry bulk commodities, or by such agencies as the Commission by order otherwise direct, of agency tariff schedules which contain ncreases in rates and charges on bulk commodities by or on behalf of tank truck arriers for the transportation of said commodities, except carriers' cement operations nd operations in Southwestern United States, there shall be concurrently filed and erved therewith, as hereinafter provided, a verified statement presenting and omprising the entire evidentiary case which is relied upon to support the proposed ate increases.

Carriers thus required to submit their evidence when they file their tariff schedules re hereby notified that special permission to file those schedules shall be onditioned upon the publishing of an effective date not less than 45 days subsequent the date of filing, to enable a proper evaluation of the evidence presented. Data to submitted as hereinafter set forth represent the minimum data required to be filed nd served, and shall not be considered as limiting the type of evidence that may be presented at the time of filing said schedules. If a formal proceeding is instituted, the carriers shall update the evidence submitted at the time of filing said schedules to reflect their then existing revenue needs.

(b) The specialized tank truck carriers of liquid and dry bulk commodities which are subject to the provisions hereof are the members of the Bulk Carrier Conference, Inc.

2. *Traffic study.*—(a) The Bulk Carrier Conference, Inc., or its member carriers shall submit a traffic study for the most current 12-month calendar year available, which shall be referred to as the "base calendar year-actual." The study shall include a probability sampling of the actual traffic handled during the time period for each study carrier.

(b) In addition to the traffic and revenue need studies, the Bulk Carrier Conference, Inc., or its member carriers shall submit cost and affiliate data studies, and may submit similar studies with respect to an expanded group of study carriers.

(c) The sample of traffic handled by the study carriers shall be taken in accord with acceptable standards of probability sampling principles and practices, and an explanation and evaluation thereof from the standpoint of purpose, sample design, estimation procedure, disclosure of sampling errors, quality control involved in processing and tabulating data, and the statistical analysis performed shall be given. This explanation should include the number of single-line shipments and revenues derived therefrom which were not included in the frame of study carriers.

(d) The following statistical data relative to the components of the sample must be submitted:

1. The number of *single-line* shipments derived therefrom for the total traffic (issue and nonissue) and issue traffic only.

2. The number of interline shipments and revenues derived therefrom for the total traffic and the issue traffic only.

3. The number of interline segments moved by the study carriers and revenues derived therefrom for the total traffic and issue traffic only.

4. The number of interline segments carried by nonstudy carriers and revenues derived therefrom for the total traffic and the issue traffic only.

(e) For cost and revenue purposes the Bulk Carrier Conference, Inc., or its members shall use the issue traffic handled solely by the study carriers in either single-line or interline service, but they may submit additional data on a through basis, demonstrating that use thereof does not result in a substantial sampling bias.

3. *Cost study.*—(a) Highway Form B may be used, or this formula may be modified if adequate justification is given therefor. Service unit costs shall be developed for each individual study carrier, adjusted by size of the shipment and, length of haul, and shall be applied to the individual carrier's traffic service units as developed from the traffic study. Operating ratios shall be determined for the issue traffic by individual weight brackets affected by the rate proposal for: (1) the traffic study year; (2) a "present pro forma year" based on present wage, price and productivity levels prevaling on a date no later than 45 days prior to the date of the tariff filing; and (3) a "restated pro forma year" based on provable wage, price, and productivity levels prevailing on the effective date of the proposed rates, with a separation indicating projected operating ratios on two bases, namely, "based on current revenues," and "based on proposed revenues." Operating ratios shall also be shown for all other traffic not affected by the rate proposal for the same weight brackets as shown for the issue traffic, but only for the period indicated in subparagraph (1) of this paragraph. In determining the cost for

interline movements involving both study and nonstudy carriers, either the weighted composite unit cost of the study carriers or the applicable regional average unit cost should be used for that portion of the interline movements handled by the nonstudy carriers.

(b) In addition to the operating ratios, the cost study shall also be used to develop and provide the revenue-to-cost comparisons for the time period specified.

(c) For both the operating ratios and the revenue-to-cost comparisons, the application of each individual study carrier's unit costs to its traffic service units, applies only to the "base calendar year-actual." The application of provable labor and nonlabor cost increases for the purpose of updating the "base calendar year-actual" cost data may be accomplished by using one of the following methods: (1) individual carrier "updating" data applied to each of the respective study carrier's base data; (2) composite carrier "updating" data—for those individual study carriers whose revenues from the issue traffic during the "base calendar year-actual" amount to 50 percent or more of their respective total system revenues—applied to the study carriers' base data; or (3) composite carrier "updating" data—for those study carriers which in total account for 50 percent of the issue traffic revenues during the "base calendar year-actual"—applied to the study carriers' base data. In method (3) the study carriers to be used shall be selected from a list of study carriers arrayed in descending order beginning with the carrier deriving the greatest percentage of its total system revenues from the traffic at issue. The issue traffic revenues for each of the study carriers (as defined above) shall be accumulated until such revenues amount to 50 percent of the total issue traffic revenues for all study carriers. The study carriers thus obtained shall, on a composite basis, be used for "updating" purposes. However, method (3) may be used only if method (2) indicates less than six individual study carriers obtaining 50 percent or more of their respective total system revenues from the issue traffic. The sample values for expenses and revenues shall be expanded to full year values without adjustments to known annual report figures of any carrier.

(d) Where cost studies are developed through the use of computer processing echniques, there shall be submitted a manual application of the costing procedures used for one traffic and cost study carrier in order to demonstrate the procedures by which the computer program distributes the annual report statistics, and applies ervice unit costs to each shipment. An illustration of the application of service unit-osts to the applicable traffic service units generated by one single-line and one nterline sample shipment shall also be submitted.

4. *Revenue need.*—Traffic and cost study carriers shall submit evidence of the sum f money, in addition to operating expenses, including that needed to attract debt and quity capital, which they require to insure financial stability and the capacity to ender proper service.

5. *Official notice.*—The Commission will take official notice of all of the proponent arriers' annual and quarterly reports on file with the Commission.

6. *Service.*—(a) The detailed information called for herein shall be in writing and all be verified by a person or persons having knowledge thereof. The original and 16 pies of each verified statement for use by the Commission shall be filed with the cretary, Interstate Commerce Commission, Washington, D.C. 20423.

(b) One copy of each statement shall be sent by first-class mail (1) to each of the gional and district offices of the Commission in the area affected by the proposed crease, where it will be open to public inspection; (2) to the State regulatory agency sponsible for such matters in States served by the carrier and affected by the proposal; and (3) to each party of record in the last formal proceeding involving a general rate increase in the affected area of territory.

(c) The service requirements of rule 22 of the Commission's General Rules of Practice should be observed. Information with respect to carrier affiliates may be served on the parties in summary form, if so desired. A copy of each statement shall be furnished to any interested party on request.

7. *Availability of underlying data.*—All underlying data used in preparation of the material outlined above shall be made available in the office of the party serving such data during usual office hours for inspection by any party of record, and shall be made available to the Commission upon request therefor. The underlying data shall be made available at the hearing, but only to the extent specifically requested in writing and required by any party for the purpose of cross-examination.

No. 36226

DURBIN PAPER STOCK CO., ET AL. v. ABERDEEN AND ROCKFISH RAILROAD COMPANY, ET AL.

Decided October 28, 1976

Certain tariff provisions resulting in intraterminal and interterminal switching charges in addition to all other applicable charges (including demurrage) found not shown to be inapplicable or unlawful. Complaint dismissed and proceeding discontinued.

Abraham A. Diamond for complainants.

Emried D. Cole Jr., Neill W. McArthur, Jr., Charles N. Marshall, Rodger K. Johnson, Richard S. M. Emrich III, Harvey Huston, Harry L. DeLung, Jr., Howard D. Koontz, Donal L. Turkal, Don McDevitt, Charles H. Lombard, R. H. Stahlheber, and *R. S. Davis* for defendants.

REPORT AND ORDER OF THE COMMISSION

DIVISION 2, COMMISSIONERS HARDIN, O'NEAL, AND CHRISTIAN

BY THE DIVISION:

The modified procedure was followed. Exceptions to the initial decision of the Administrative Law Judge were filed by the complainants, to which defendant railroads replied. In addition, a petition for further hearing was filed by complainants under section 1100.101(b) of the General Rules of Practice for the purpose of introducing new evidence in this proceeding. The petition was granted by order of the Commission, entered June 15, 1976, and the additional evidence has been considered and given its appropriate weight in the final determination of this matter. Our ultimate findings are the same as those recommended by the Administrative Law Judge although for different reasons. Exceptions and requested findings not specifically discussed in this report nor reflected in our findings or conclusions have been considered and found not justified or their resolution unnecessary for the proper disposition of the proceeding.

The basic facts as set forth in the initial decision are essentially correct. Except where inconsistent herewith, we affirm and adopt these statements of facts and also the conclusions of the Administrative Law Judge as our own. The facts are restated here only insofar as it is necessary for a proper understanding and resolution of certain issues raised on exceptions and further hearing.

Complainants[1] are brokers in recyclable wastepaper. They purchase wastepaper, obtaining title to the refuse, and then resell it to buyers for recycling into paper and paper products. These brokers operate under a system of blind billing which is a method of retaining anonymity between the supplier and the ultimate purchaser of the product. This protects the broker from revealing his sources which, if disclosed, would obviate the necessity for his services. The separate transactions of buying and selling sometimes occur simultaneously, but often a buyer has not yet been located when the goods arrive at the railroad station consigned to complainants. In this situation, the freight is released to the local railroad agent for forwarding instructions from complainants which requires a switch of the shipment to a holding track while a buyer is found.

The charge assessed for this switching service is at issue in the instant proceeding. The charge is authorized by tariff provisions, such as item 4010 of Seaboard Coastline Railroad Company's Tariff 583-31-A, I.C.C. No. 85,[2] which provides that when a shipper orders a loaded car removed from industry or team tracks and held by the carrier awaiting instructions, the intraterminal and interterminal switching charges will be assessed for the movement in addition to all other applicable charges, including demurrage.

The complaint, filed on July 21, 1975, alleges that the intraterminal and interterminal switching charges published on behalf of defendant railroads[3] were unjust and unreasonable in violation of section 1(5), 1(6), 3(1), and 6(7) of the Interstate Commerce Act. The numerous violations of the act alleged in the complaint were fully set forth by the Administrative Law Judge and, therefore, need not be repeated here.

The Administrative Law Judge, in his initial decision, dismissed the complaint, finding that the assailed tariff provisions imposing switching charges in addition to other applicable charges (including demurrage) are applicable on complainants' traffic and that the application of such charges is not shown to be in violation of any section of the act. In reaching this conclusion, he noted that the complaint failed to show a single incident where any defendant had assessed a switching charge pursuant to the assailed tariffs; nor was there any showing that complainants had paid such switching charges. He concluded that in light of the evidence submitted it was impossible to make a determination in the matter, and stated that if complainants were to prevail it would be necessary for them to come forth with evidentiary facts that would support their claims. The Administrative Law Judge concluded that, "Their failure to do so renders their attack on the assailed tariff provisions to have little or no value."

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[1] Perry H. Koplik & Sons, Inc.; Joseph E. Marcus, S. F. Marcus, and C. M. Alpert, a partnership d.b.a. National Fiber Supply Co.; and Howard Zuker Associates, Inc.

[2] This tariff is representative of the various tariff provisions cited by complainants.

[3] All railroads in southern territory and southwestern and western trunkline regions.

Such specific information was subsequently provided by complainants on further hearing. However, for reasons which will be discussed later, this additional evidence, as well as defendants' exceptions to the initial decision, does not lead us to reach a decision different from that of the Administrative Law Judge.

In their exceptions complainants enumerate 25 errors allegedly committed by the Administrative Law Judge. The exceptions are basically cumulative and reiterate complainants' position as presented in their complaint and supporting documents. The length and repetitive nature of these exceptions n[illegible]sitates disposition without specific reference or detailed disc[illegible]on thereof. The exceptions, as regrouped and restated, allege the following:

(1) Based upon the fact that there are two groups of tariff provisions, those published on behalf of the defendant railroads operating in the Southern Freight Association territory and those published on behalf of [illegible] defendant railroads operating in the southwestern and western trunkline regio[illegible] [illegible]Administrative Law Judge erred in failing to distinguish and discuss separate[illegible] two groups of provisions.

(2) The Administrative Law Judge erred in failing to distinguish and discuss separately the applicability of the assailed tariff provisions as published prior to October 10, 1974, and those provisions effective October 10, 1974, and the impact of the demurrage tariff on these two provisions.

(3) The Administrative Law Judge erred in finding that the assailed tariff provisions are applicable to complainants' traffic.

(4) The Administrative Law Judge failed to give any weight to the testimony of complainants' witnesses respecting the numbers of points at which cars originate and the difficulty in specifying where violations of the law occur.

(5) The Administrative Law Judge failed to consider and comment on the defendants' responses to complainants' written interrogatories and requests to admit.

(6) The Administrative Law Judge erred in finding that there were no section 1(5), 1(6), and 3(1) violations of the act.

(7) The Administrative Law Judge erred in finding that blind billing is not a normal line-haul movement (in normal line-haul movements the destination is known at the time the loaded car is removed from the supplier, and the car can be moved without any need for switching to the terminal or classification area for final destination) and that defendants provide an additional service over and above the line-haul services rendered on the cars.

(8) The Administrative Law Judge erred in finding that the preparation of an environmental impact statement is not warranted in this proceeding.

(9) The Administrative Law Judge erred in finding that complainants have not proven their case.

There were also several exceptions pertaining to the ruling by the Administrative Law Judge that complainants' case is deficient due to a lack of specific evidence that switching charges were assessed pursuant to the assailed tariffs. This purported defect, however, is in any event now cured by the additional evidence submitted on further hearing and, hence, these alleged errors are now moot.

Consolidating the specific allegations of 25 errors, the complainants present two issues for resolution on appeal: Whether the Administrative Law Judge erred (1) in his interpretation of the assailed tariff provisions; and (2) in his conclusion that the complainants failed to prove a case of unlawfulness under sections 1(5), 1(6), and 3(1) of the act.

DISCUSSION AND CONCLUSIONS

In reviewing the exceptions and evidence of record, including the new evidence submitted on further hearing, we do not find it necessary to discuss each point raised by complainants, in that such matters do not require resolution for a final determination in this proceeding. This is because complainants base their case on an erroneous interpretation of the tariff provisions governing the switching charges in issue, which is fatal to their contentions.

Complainants' somewhat circuitous argument is as follows. Complainants contend that if a car is turned out by an industry to its local railroad agent for forwarding instructions from a third party (in this case complainants), that car is still on demurrage with the supplier and is not subject to any switching charge, unless the third party orders the car to be switched. Assertedly, the car remains on continuous demurrage until it is loaded. (Loading is defined as the point when full forwarding instructions have been given.) The argument continues that if a car has not been loaded and released, it cannot be switched to a holding track.

Under the tariff, a carrier is entitled to recoup a switching charge if forwarding instructions have been given. If no forwarding instructions have yet been communicated, then the car remains on continuous demurrage with the supplier. What complainants have overlooked, however, is that the forwarding instructions referred to in the tariff have already been given by the supplier when the goods were consigned to complainants. It is the consignor's instructions and not the consignee's subsequent instructions which are relevant to the tariff issue. By complainants' own admission, title passes when they receive the goods from the supplier. The system of blind billing must be viewed as two separate transactions in this regard: that is, one sale from the supplier to the complainants and another sale from complainants to the ultimate purchaser of the goods. Forwarding instructions have already been given at the point when complainants receive the goods; therefore, a switching charge can lawfully be assessed under the tariff. It is only in the situation where no forwarding instructions have been given at the point of origin that a car remains on continuous demurrage and no switching charge can be assessed in the event the car is removed to a holding track.

In light of the above, it is concluded that it is complainants who are confused as to the proper construction of the tariff and that the Administrative Law Judge did not err in his interpretation. Similarly, complainants have failed to establish section 1(5), 1(6), or 3(1) violations of the act.

In view of the foregoing, the further evidence presented by complainants designating the specific switching charges assessed by respondents does not lead us to reach a different conclusion than that in the initial decision.

We find that the assailed tariff provisions are applicable on complainants' traffic; that the application of such charges is not shown to be in violation of any section of the act; and that the complaint should be dismissed.

We further find that this decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

IT IS ORDERED, That the complaint be, and it is hereby, dismissed and that this proceeding be, and it is hereby, discontinued.

353 I.C.C.

No. W-1270

MASCONY TRANSPORT AND FERRY SERVICE, INC. INITIAL OPERATIONS—NEW LONDON TO GREENPORT, L.I., NEW YORK

Decided November 3, 1976

Public convenience and necessity found to require operation by applicant, in interstate or foreign commerce, as a common carrier by water, by self-propelled vessels in the transportation of general commodities and passengers between the ports of New London, Conn., and Greenport Long Island, N.Y. Issuance of a limited-term certificate approved upon compliance with certain conditions, and application in all other respects denied.

William J. Augello, Malcolm H. Flash, Robert W. Ginnane, and *Frank I. Weiner* for applicant.

Peter A. Greene, Donald Macleay, Gerard M. McAllister, Irving L. Price, Jr., and *Robert Tasker* for protestants and interveners.

William J. Lynch for intervener, the Connecticut Department of Transportation.

Frederick Godfeder for intervener, the New York Department of Transportation.

John J. Munzel for intervener, the Village of Greenport, N.Y.

REPORT OF THE COMMISSION

DIVISION 1, COMMISSIONERS MURPHY, GRESHAM, AND CLAPP

CLAPP, *Commissioner:*

Exceptions to the initial decision and order recommended by the Administrative Law Judge, which exceptions embrace a petition to reopen the record for receipt of further evidence, were filed by applicant, and protestants New London Freight Lines, Inc., and Bridgeport and Port Jefferson Steamboat Co., filed a joint reply thereto.

By application filed May 29, 1973, Mascony Transport and Ferry Service, Inc., of New Bedford, Mass., seeks authority to engage in operation, in interstate or foreign commerce, as a common carrier by water in the transportation of general commodities and passengers by self-propelled vessels, between the ports of New London, Conn., and Greenport, Long Island, N.Y. The application is opposed by protestants New London Freight Lines, Inc. (NLFL), and Bridgeport and Port Jefferson Steamboat Co. (BPJS), and by interveners, Shelter Island & Greenport Ferry Co., Inc. (SIGF), and East End Supply Co., Inc. In addition, evidence concerning the effect of the proposed operation was presented by interveners, the Connecticut Department of Transportation, the New York Department of Transportation, and the Planning Board of the Village of Greenport, N.Y.

In his initial decision and recommended order, the Administrative Law Judge recommended that the application be denied because of operational considerations: safety at New London and environmental at Greenport. On exceptions, applicant generally contends that the Administrative Law Judge erred (1) in failing to find that the public convenience and necessity require the proposed operation; (2) in his interpretation of section 102 of the National Environmental Policy Act of 1969 (NEPA); (3) in considering the proceeding as one significantly affecting the quality of the human environment; (4) in failing to apply the five criteria of section 102(c) of NEPA to the evidence of record; (5) in failing to comply with the Commission's rules on environmental findings; (6) in finding there would be insufficient safety precautions in New London; and (7) in finding there was an absence in the record of information necessary for environmental determinations. In a joint reply, protestants NLFL and BPJS aver that the findings of the Administrative Law Judge are in accord with the evidence of record and should be affirmed.

PRELIMINARY MATTERS

Applicant sought to introduce certain additional evidence submitted with its exceptions. By order of October 17, 1975, we reopened the proceeding and accepted the tendered evidence. The materials accepted consist of (1) a report by the New York Department of Environmental Conservation concerning the improvement of a ferry slip in Greenport Harbor, Town of Southold, Suffolk County, N.Y., (2) a permit to improve the slip, (3) a letter dated August 15, 1974, from the City Manager of New London indicating that he expected City Council approval for the city to enter into a contract with applicant for the use of the municipal pier as a docking facility, and (4) a lease between applicant and the city of New London. In addition, the order of October 17, 1975, also directed that an evaluation be made of the effect of the proposed operation upon the environment in accordance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*). Such evaluation is set forth in appendix A and has been given full consideration in reaching our decision herein.

Subsequent to the hearings, protestant NLFL sold, as pertinent, its interest in the authority between New London and Orient Point, New York, to Cross-Sound Ferry Services, Inc., of New London.[1] Subsequent to the sale, Cross-Sound filed on October 29, 1975 a petition to be substituted as protestant in this proceeding, and jointly with BPJS filed on November 21, 1975 a petition for reconsideration of the order of October 17, 1975 and to reopen the proceeding for receipt of additional evidence. Applicant filed a reply to the joint petition.

The joint petitioners contend in their November 21, 1975 petition that we erred in our order of October 17, 1975 (1) in finding that the proceeding is in effect unopposed, (2) in reopening the record to receive late-tendered evidence submitted by applicant, and (3) in receiving as evidence of record unverified documents filed in docket No. W-1270 (Sub-No. 2TA). These petitioners allege that the Commission's acceptance of applicant's late-tendered evidence without providing an opportunity for rebuttal deprives them of their right to cross-examine on and respond to such evidence. They note additionally that the documents submitted as appendices N and Q to applicant's petition for reconsideration in docket No. W-1270 (Sub-No. 2TA) are unverified. Petitioners request, as an alternative to setting aside the October 17, 1975, order, reopening for further hearing in order to cross-examine on and respond to the materials admitted into evidence via the October 17, 1975, decision and in order to be permitted the opportunity to submit their own evidence of "changed circumstances." Among those alleged circumstances are various changes, both implemented and planned, pertaining to the operations of Cross-Sound.

Inasmuch as Cross-Sound is the successor to a protestant which has actively and continuously opposed the application, the petition to be substituted for protestant NLFL will be granted.

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[1] The transaction was approved on February 28, 1975, in Finance Docket No. 27846, and petitions for reconsideration were denied by order of Appellate Division 3, on April 29, 1975. Prior to the consummation of the transaction on May 23, 1975, Cross-Sound held temporary authority.

Since Cross-Sound had not attempted to intervene and NLFL had sold its authority, we did consider this proceeding to be virtually unopposed (the pleadings of the commonly controlled joint protestants indicated that they were principally concerned with the effect of this transaction on NLFL) at the time of our October 17, 1975, order. It may be that we erred in reaching this conclusion. In any event, due to Cross-Sound's request for substitution, it is now clear that this proceeding is in fact opposed.

The course followed by this proceeding has been, to say the least, unusual. It was not, unfortunately, until the time of our October 17, 1975, order that we fully realized that environmental review of the involved proposal would be necessary. Accordingly, that order accepted various evidence tendered by applicant pertaining to matters of environmental import.

Applicant, as well as protestants and other interested parties, has now been given a full opportunity to present any matters bearing on environmental effects in the course of the environmental review process, which matters have been taken into account in preparation of the environmental impact statement contained in appendix A to this decision. As the proceeding is now clearly opposed, the matters contained in appendixes N and Q to applicant's petition for reconsideration in docket No. W-1270 (Sub-No. 2TA) will be given no consideration except insofar as such matters may be encompassed in the final environmental impact statement. Protestants have, as have other parties, been given a full opportunity to participate in the environmental review process and to rebut any statements made therein by applicant. Other tendered evidence of applicant accepted via our October 17, 1975, order will likewise be considered only insofar as such matters may be encompassed in the final environmental impact statement.

We accordingly deny the request of protestants for reconsideration of the October 17, 1975, order, except insofar as that order has been clarified and modified herein. We also deny the request in the alternative of petitioners to reopen the proceeding for further hearing. As aforesaid, protestants will not be deprived of any opportunity to rebut evidence tendered by applicant after the close of oral hearings. As to the evidence of "changed circumstances" concerning Cross-Sound's operations which protestants seek to introduce, such evidence might provide assistance in making an optimum decision. However, the length of time already consumed by this proceeding must be given consideration. There comes a time when litigation must end and a decision on the merits must be rendered. This problem was alluded to by the Supreme Court when it stated in *I.C.C. v. New Jersey*, 322 U.S. 503, 514 (1944):

> If upon the coming down of the order litigants might demand rehearings as a matter of law because some new circumstance has arisen, some new trend has been observed, or some new fact discovered, there would be little hope that the administrative process could ever be consummated in an order that would not be subject to reopening.

It is unfortunate that we were forced to reopen this proceeding once due to our own failure initially to institute environmental review. This does not, however, warrant a second reopening with further delay in the ultimate decision.

The evidence, the Administrative Law Judge's recommendations, the exceptions, the joint reply and the final environmental impact statement have been considered. We find the Administrative Law Judge's statement of facts to be correct in all materials respects and, as modified and supplemented herein, we adopt that statement as our own. The pertinent facts will be restated to the extent necessary for clarity of discussion.

FACTS

The unusual course followed in this proceeding creates difficulties in determining the precise evidence which should be utilized in finding the facts necessary to reach a decision. The evidence received at hearing by the various parties was presented under oath and subject to full cross-examination. Evidence received during the subsequent environmental review process is more up to date but is unverified.

We are of course obliged to utilize the environmental impact statement and the matters discovered therein in deciding environmental issues posed by this proceeding. However, in our consideration of other nonenvironmental issues, we believe that we may not take into account unverified evidence and shall accordingly only consider evidence presented through the time of the oral hearing. We will of course take note that Cross-Sound has acquired the relevant NLFL operations. This matter has been presented formally and is not subject to dispute.

Our presentation of facts in this section accordingly does not encompass evidence received during the environmental review process. Such evidence is encompassed in the environmental impact statement included as appendix A.

Applicant presently holds no authority from this Commission, but does own a vessel.[2] In addition applicant has entered into an agreement to purchase three additional vessels similar to the one it owns. In New London, applicant has made arrangements for a docking facility. In Greenport, applicant has purchased property and has made plans to improve it for docking purposes. Applicant proposes to provide service throughout the year, making at least one round trip daily between October 1 and April 30, two round trips daily from May 1 through July 31, and four round trips a day from August 1 through September 30. Applicant would provide a space reservation system for 50 percent of the vessel's capacity. It projects a substantial profit from its first year's operation based on (1) a study conducted by the Connecticut Department of Transportation,[3] and (2) the judgment of applicant's president who believes that there is an untapped source of passenger and vehicular traffic during the early part of the year in the movement of seed potatoes from points in Maine to eastern Long Island and other joint motor-water-motor freight traffic. Applicant proposes to man the *S.S. Greenport* with stockholders and directors and to provide a round trip in 4 hours with one-half hour unloading and loading at each end and 1 1/2 hours to move between the ports. Applicant has submitted evidence of its fitness, willingness, and ability to perform the proposed service.

Over 100 witnesses, as set forth in appendix B, testified in support of the application. They represent various backgrounds and occupations. The witnesses came from some New England States, but primarily from the eastern half of Long Island. They use ferry service when their travels are for business as well as for pleasure or family requirements. Their complaints about the existing service between New London and Orient Point, Long Island, N.Y., center around excessive waiting periods (of up to 6 hours), particularly during the summer months; inability of all waiting customers to board ferries with automobiles, and sometimes even as foot passengers; inadequacies of convenience facilities; excessive traffic congestion at New London and Orient Point; inability of truckers to use existing ferry service because the waiting time would cause hours of service regulations to be violated by drivers,[4] and the inconvenience of sleeping in trucks or automobiles at docks in order to be assured of a space on a vessel.

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[2] The vessel, originally the S.S. *New Jersey*, was purchased by applicant in March 1973 and renamed the S.S. *Greenport*. It was built in 1936, is steam powered, and has a carrying capacity of 100 automobiles (or 70 automobiles and 10 trucks) and 800 passengers.

[3] As pertinent here, the report of the Connecticut Department of Transportation, Bureau of Planning and Research, reached among others the following general conclusions: (1) that peak summer demand was not always satisfied during past years; and (2) that present summer service is definitely inadequate to meet demand.

In addition, seven witnesses testified concerning the proposed service, but appeared neither in support nor against the proposal.

Protestant Cross-Sound holds authority to transport (1) general commodities, automobiles with passengers, and tractors, trailers, and trucks, loaded and empty, between New London, Conn., on the one hand, and, on the other, Orient Point, N.Y. (located approximately 8 miles east of Greenport), and (2) passengers between New London and Orient Point. Its predecessor NLFL operated 3 ferries, each of which is capable of carrying approximately 20 cars, between Orient Point and New London.

NLFL submitted that in a 1972 traffic study it found that 80 percent of the passengers using its service were nonrecurring passengers. As a result of such traffic patterns, its operations have been cyclical with peaks during the summer months, a sharp decline in the fall, and a buildup in the spring. Such cycles result in losses in winter which then must be offset by profits during the rest of the year. This protestant included an abstract of the revenues and expenses for each month from January 1972 through November 1973 which demonstrated losses as great as $41,400 during the winter months and profits as high as $78,037 in summer. For the entire 23-month period covered it only had a profit of approximately $12,000.

Not only was NLFL's operation subject to seasonal cycles, but the daily use of its equipment during the peak summer season also varied. This protestant presented traffic summaries for each day from July 27 through August 19, 1973, which demonstrated that the ferries had empty spaces on some trips while at other times not all vehicles could be taken that sought passage. These cyclical features make it difficult, according to this protestant, to operate sufficient vessels to meet peak period needs, as the added expenses of such additional vessels would more than offset the additional revenues generated and could impair the viability of the entire service.

NLFL contended that because of the threat of the construction of a bridge, which basically would have made unnecessary the existing ferry service, it was reluctant to allocate the funds required to acquire newer and faster ferries. With the threat of such a bridge removed, protestant stated that it had begun plans to build as many as five vessels capable of carrying 40 to 50 vehicles and 300 to 400 passengers. It had received a commitment letter from the Federal Maritime Administration for Government-insured financing pursuant to provisions of Title XI of the Merchant Marine Act of 1936, and had arranged for the contruction of the first vessel.

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[4] Most of the trucker witnesses haul commodities which are exempt from economic regulation by this Commission under section 203(b) of the Interstate Commerce Act, or utilize private carriage in conjunction with their business enterprises. The latter is not subject to economic regulation. See sections 203(a)(17) and 203(c) of the act.

NLFL stated that its vessels were regularly inspected and drydocked annually where they were repainted for the upcoming season. Passengers always were given the opportunity to get out of their vehicles before other vehicles were parked, although not all passengers desired to do so. All passengers on the Carribbean Ferry (one of NLFL's vessels) were prohibited from staying in their vehicles. This protestant canceled less than 1 percent of its scheduled crossings in 1973 through December 5. In addition protestant introduced evidence from certain user witnesses as set forth in the appendix.

BPJS holds authority to transport by self-propelled vessels (1) passengers (a) between Bridgeport, Conn., and Port Jefferson, N.Y., and (b) between Bridgeport, and Rye, N.Y., and (2) general commodities between Bridgeport and Port Jefferson.[5] It operates one vessel during its season from May 25 through October 14. It does not operate at capacity and fears diversion of some of its traffic to applicant. Only 32 percent of its trips had a full capacity of vehicles and it has never had a movement with a full passenger load. During 1972 it lost $44,000 on revenues of $434,000, and fears that any diversion would increase its losses.

SIGF intervened in opposition to the application on the grounds that the operation proposed by Mascony would seriously impair the safe operation of the present ferry service between Shelter Island and Greenport which the residents of Shelter Island depend upon for access to the mainland of Long Island.

The East End Supply Company, Inc., a retail merchant operating a store located adjacent to the property that Mascony proposes to use as its Greenport terminal intervened in opposition to the application. The basis for this opposition is that the proposed operation would cause serious traffic congestion in the downtown business district of Greenport.

The New York State Department of Transportation intervened in opposition to the application essentially on the grounds that the proposed Greenport terminal site of Mascony would result in acute traffic congestion in downtown Greenport.

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[5] BPJS thereby operates at the closest points approximately 69 miles west of the site of the proposed operation.

The Village Planning Board of the Village of Greenport opposes the location of the proposed Mascony terminal at Greenport. Its position is that the location would be inconsistent with present and planned future use of the Greenport central business district and would so seriously aggravate an already badly congested traffic flow as to impair the basic character of Greenport and interfere with access by ambulances, police cars, and fire equipment to emergencies occurring within the area.

The Connecticut Department of Transportation sought only to make the Commission aware of the hazard posed by the access originally proposed over railroad grade crossings in New London.

Discussion and Conclusions

Applicant seeks to institute a ferry service between specified points in Connecticut and Long Island. Presently a competitive service is provided by protestant Cross-Sound, NLFL's successor-in-interest. In support of its proposed operation applicant has introduced testimony from approximately 100 users of NLFL's service. The testimony generally condemns such service because of (a) the long waits, usually between 1 and 2 hours, but on occasion as long as 6 hours, (b) the difficulty in getting out of or into the car or truck after it has been loaded aboard the ferry, and (c) the unsafe or unsanitary state of the vessel. It is on the basis of this testimony that applicant seeks approval of its application. It is our view that the operation of BPJS is not competitive with that proposed as BPJS operates between different, comparatively distant, points.

The evidence concerning delays in service, involving waits of up to 6 hours, conclusively shows the inability of NLFL to meet the needs of the public. Although these delays generally occurred during peak summer periods, a review of the evidence demonstrates that excessive waits also occurred at various other times throughout the operating season of NLFL. The proposed use of a reservation system by applicant should go a long way in alleviating these long waits. A person desiring to use applicant's service would be able to call ahead to reserve a place on the ferry and arrive in time to board. Another complaint of users of NLFL's service concerned the inability or difficulty of getting into and out of vehicles once they were loaded upon this protestant's vessels. The larger ferry to be used by applicant would eliminate this problem. Similarly, the amenities of the larger vessel would lead to a more relaxing and enjoyable ride for the patrons.

The benefits of a new service might very well lead to additional passengers, (1) thereby reducing the number of people who drive around Long Island Sound rather than use the present ferry service, and (2) thereby increasing the number of tourists to this area to the direct benefit of the businesses located there. The need for additional service was pointed out in a study by the Connecticut Department of Transportation, Bureau of Planning and Research where, as noted above, it found an improvement in service might lead to more volume.

Throughout this proceeding NLFL and applicant seemed to consider this a proceeding to determine which operation would provide the ferry service to this portion of Long Island. We do not accept this argument. As noted above the number of passengers may very well increase significantly if the application is granted, thereby providing sufficient volume to maintain both operations. However, even if the new operations should disrupt the existing service, there is no right to engage in water transportation without competition, especially where, as here, the service provided has not been satisfactory. Furthermore, the successor to NLFL, Cross-Sound, is itself in effect providing a new service. Cross-Sound began its operation after the instant application was filed. Although Cross-Sound's service may prove superior to that of NLFL, the past history of difficulties with the existing ferry service warrants the authorization of a second new service in competition with Cross-Sound's new service.

Several witnesses complained because protestant NLFL ceased operating during the winter months. We believe the users of the ferry service should have available to them the use of a ferry throughout the year as proposed by applicant. This should prove particularly important during those months in which seed potatoes are being shipped. A grant of authority to a water carrier willing to operate throughout the year should be an economic boon to this area.

Throughout the public hearing portion of the proceeding, evidence was presented concerning the construction of a cross-sound bridge which would effectively eliminate the need for a ferry service. However, shortly before the hearings began the possibility of such a bridge was ruled out. NLFL stated that were it not for the threat of the bridge, it would have constructed new vessels to replace the existing ferries. After the possibility of a bridge had been ruled out, NLFL pursued plans for the construction of vessels to replace the existing ferries but had not contracted for their construction because of the threat then posed by the instant application. NLFL stated that if the application were denied it would contract with the builder and start construction of the new vessels. We can understand a reluctance to invest sufficient money to construct new vessels better to serve the riding public because of the threat of the bridge. However, in view of the inadequacy of its service, we believe it was incumbent on this protestant to make some effort to improve its service beyond merely planning for the construction of new vessels once that threat was removed. Its failure to pursue promptly such improvements shows some lack of concern for the public and may very well have contributed to the filing of the instant application.

The Commission's environmental impact statement raises serious questions as to the effect the proposed operation would have on the environment. The purposed operation would add a substantial volume of traffic to the streets of downtown Greenport during times when traffic levels already exceed design level capacity and a potential safety hazard will be created as a result of the need for ferry-related traffic in New London to cross ConRail tracks to gain access to the landing site. In addition, the introduction of large ferry vessels into Greenport Harbor, which accommodates a large number of small craft in the summer months, could create some safety problems. Applicant has pursued several alternative plans to solve these problems as they arise. On the other hand, the fuel savings from the proposed operation (projected to be as much as 600,000 gallons annually) could be significant and in our opinion on the whole outweigh the possible environmental damages that could result from authorization of the proposed operation, considering the apparent willingness of applicant to take steps necessary to minimize adverse environmental impacts. Therefore, on the whole we conclude that the proposed operation would not have such a deleterious effect on the environment as to warrant denial of the application.

Several other matters remain to be considered. First, it should be noted that although we will grant the application, many problems remain before applicant will be in a position to begin operating. Applicant must determine where it will actually dock in Greenport, improve the landing point to allow its vessel to dock, secure and improve suitable staging areas, comply with various local, State, and Federal regulations, and secure appropriate permits. We are in no position to comment on the merits of such applications for permits and our decision should not be interpreted as Commission support or lack of support for such applications. Should such permits be withheld and applicant be unable to locate a different site in Greenport or New London that would enable it to secure the required permits, then the proposed operation would in all likelihood never begin. Furthermore, applicant has made certain proposals which would improve on the existing ferry service and has proposed modifications in its operating plan in order to alleviate adverse environmental effects. If we were to grant unconditionally the authority requested there would be no safeguard should applicant decide not to follow through with such improvements or not make modifications necessary to minimize environmental harm. For these reasons, we believe applican should be granted at this time only a 3-year term certificate. This will give this Commission an opportunity to determine if applicant has in fact begun to operate, is operating in the manner it has proposed, and is in good faith taking measures necessary to alleviate adverse environmental impacts. Therefore, the certificate granted herein will expire at the end of the 3-year term, unless at least 6 months prior to its expiration date applicant files a petition for its permanent extension and demonstrates that it has been generally operating as it has proposed or under a more environmentally beneficial alternative, has endeavored to minimize adverse environmental impacts, and is in compliance with the Interstate Commerce Act and the applicable rules and regulations thereunder. The Commission is aware that not only Mascony but various other parties must cooperate in efforts along these lines, particularly insofar as environmental effects are concerned. If we find that a particular party has via unreasonable actions hindered good faith efforts by applicant to, in particular, operate in a manner which causes minimal environmental harm, we shall take such matters into account in determining whether to extend the certificate granted herein.

FINDINGS

We find that the present and future public convenience and necessity require operation by applicant, in interstate or foreign commerce, as a common carrier by water, of general commodities and passengers by self-propelled vessels, between New London, Conn., and Greenport, Long Island, N.Y.; that applicant is fit, willing, and able properly to perform such service and to conform to the requirements of the Interstate Commerce Act and the Commission's rules and regulations thereunder; that a certificate authorizing such operation should be granted subject to the condition that it shall be limited, in point of time, to a period expiring 3 years from its date of issue; that this decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969; and that in all other respects the application should be denied.

Upon compliance by applicant with the requirements of sections 306 and 315(a) of the act and with the Commission's rules and regulations thereunder, within the time specified herein, an appropriate limited-term certificate will be issued. An appropriate order will be entered.

COMMISSIONER MURPHY, dissenting:

While I am in agreement with the majority's restatement of the general principles underlying a grant of an application, I am unable to join in today's decision because it is based upon a number of major procedural and substantive deficiencies. Although the list of these deviations is somewhat extensive, this separate expression will focus only on the following important areas: procedure; public need for the service; fitness; feasibility; environmental issues; and Federal-State (local) interaction.

Turning first to the procedural aspects of this proceeding, one of the serious deficiencies in today's decision is the failure to allow protestants and a successor-in-interest thereof (Cross-Sound) to introduce further evidence after applicant's request for further consideration was honored, the proceeding reopened to receive applicant's additional evidence and with official notice taken of matters in another proceeding. Although the majority now indicates some concern with its prior action, nevertheless, it offers no amends therefor, thus, admittedly, depriving protestants of due process of law. It is a fundamental principle of the law and this Commission's rules and regulations, that an opposing party be afforded an opportunity to show the contrary where a proponent has been allowed to present evidence. Cf., also in this connection, the Administrative Procedure Act, 5 U.S.C. 556(e) in those instances where official notice is taken of particular facts.

Again, the procedural handling of the evidence sought to be presented by protestant Bridgeport and Port Jefferson Steamboat Co. (BPJS) is somewhat unusual. As noted above, in addition to denying the request of BPJS to be allowed to rebut applicant's additional evidence, the majority appears to reject and discard the entire testimony proffered by protestant on the grounds principally that its operations are somewhat distant from applicant's proposed operations.[1] But such an approach fails to adequately consider several important factors: (1) protestant BPJS is a holder of an appropriate certificate authorizing service between points within a close proximity of applicant's proposed operations; (2) protestant BPJS provides service in the transportation of passengers and vehicles; and (3) in the absence of the services of protestant BPJS, passengers and others would be required either to travel through New York City to reach points on the eastern end of Long Island or they would create an additional demand with respect to the present service of Cross-Sound from New London. Accordingly, the majority's apparent dismissal of the evidence of protestant BPJS represents a drastic departure from the standards usually adhered to in an application proceeding, i.e., that the evidence of existing carriers is to be considered in determining whether an application should be granted.

Finally, on procedural grounds, the failure to afford Cross-Sound, the substituted protestant, an opportunity to submit evidence of changed circumstances is a matter of first importance. In denying the request of Cross-Sound, filed November 21, 1975,[2] the majority refers to the length of time already consumed in this proceeding and relies on the decision in *I.C.C.* v. *Jersey City*, 322 U.S. 503, for the principle that an end to litigation is essential in order that the administrative process may adequately function. However, reliance on that decision and principle is misplaced. This proceeding, far from being at a stage where further hearing might be inappropriate, was actually reopened for, among other purposes, the preparation of draft and final environmental impact statements. In fact, a draft environmental impact statement herein was served on February 3, 1976, with the final statement served on June 11, 1976. Thus, it is clear that the interval, November 21, 1975-June 11, 1976, a period of over 6 months, was adequate enough to permit Cross-Sound to submit evidence on its operations, with applicant and others allowed to reply. In these circumstances, there were no reasonable grounds to deny Cross-Sound's request and failure to honor that request while affording applicant the opportunity to update its own evidence is a serious departure from due process of law.[3]

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[1] In that respect, the tacit acknowledgment of the majority that on October 17, 1975, in its opinion the application was virtually unopposed gives added weight to the conclusion that the testimony of BPJS has been discarded.

[2] Cross-Sound by motion, filed October 29, 1975, sought to be formally substituted as a protestant. Apparently, no action was taken on the motion until today's decision.

Turning next to the substantive aspects of this proceeding, it must be clearly recognized that an applicant for operating authority has the burden of proving that the proposed service is or will be required by the present or future public convenience and necessity and that applicant is fit, willing, and able. See, section 309(c) of the act, 49 U.S.C. 909(c). With respect to a public need for the proposed service, applicant's entire testimony appears to be based principally upon the necessity for a substantial diversion of traffic from Cross-Sound. In fact, applicant's testimony might well be categorized essentially as predicated upon traffic statistics of Cross-Sound's predecessor and the testimony of some dissatisfied customers. However, on the balance, in light of the actual number of passengers handled by Cross-Sound's predecessor numbering well over 100,000, among other traffic handled by that carrier, the small number of dissatisfied customers is no indication of the need for additional service. This is not to say that dissatisfaction with existing services should be discounted. However, other factors of equal importance must be considered. One of the principal concerns of many of the participants herein was the possible construction of a cross-sound bridge which would have effectively eliminated the need for much of the present ferry service. In such an uncertain climate, it is clear that no prudent businessman would venture to make improvements or additions to his property or services until the bridge issue was settled. In addition, some complaints as to service appear to be related to extreme or peak demands for service on a sporadic basis. The Commission has frequently stated, for example, that the inability of existing carriers to furnish service instantly upon demand during a peak season does not establish that such carriers are either unwilling or unable to perform the required service. Cf. *Warthen Extension—Cranberries*, 117 M.C.C. 470. As noted above, the majority disregards the existing services of protestants in reaching a conclusion that there is a public need for the proposed service and categorizes the recently instituted service of Cross-Sound as a new service. Whether or not the latter service should be designated as a new service in light of a continuation of the services previously provided by New London Freight Lines (Cross-Sound's predecessor), nevertheless, the Commission has, in many instances, given due recognition of the existence of newly established services in denying an application in whole or in part. See, *West Brothers, Inc., Extension—Baton Rouge, La.*, 108 M.C.C. 485, 489, and *Truck Transport, Inc., Ext.—Jacksonville, Ark.*, 120 M.C.C. 449, 453-454.

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[3] Moreover, failure to act on the petition, filed November 21, 1975, until a disposition thereof in today's decision raises additional serious problems of due process. In a word, after a period of over 6 months, Cross-Sound is now advised that it, at one and the same time is substituted as protestant and its petition in all other respects is denied. If this is due process, then a new explanation of the term is necessary.

An applicant for operating authority must establish its fitness. Fitness includes matters relating to safety of operations. While the regulation of safety is now principally lodged in the Department of Transportation, yet before a certificate may be issued this Commission must be satisfied that applicant is or will be in compliance with all safety regulations. See, *Ewen Brothers, Inc., Com. Car., Applic.*, 117 M.C.C. 101.[4] The record herein, especially that disclosed in the several environmental assessments, indicates clearly that no finding of fitness can be made because of the uncertainty as to how and where applicant will operate at New London or Greenport, among other matters.

Finally, it must be stressed that in light of the highly speculative and conditional nature of the proposed service at either end of the water movement, the feasibility of the proposed operations has not been adequately established.

Turning next to the environmental considerations, it is pertinent to note that the hearing officer recommended a denial of the application on environmental and safety grounds. A review of both the draft and final environmental impact statements reveals, contrary to the conclusion of the majority, that a grant of the authority sought herein is a major Federal action significantly affecting the quality of the human environment. Without question, the operations, if instituted at Greenport as proposed, may have an irrevocable impact upon the environment thereat. To this must be added the probable effects of increased motor vehicle operations in and around the port area. Additionally, the apparent hazards at New London adverted to by the hearing officer in his initial decision are, nonetheless, still present. And despite the modifications now suggested by applicant at New London, its proposal apparently would run counter to the long-term policy pertaining to the removal of railroad grade crossings on the heavily traveled ConRail and Amtrak routes between Boston, Mass., and New York, N.Y., among other points. See also, Public Law 94-210, section 703 with regard to the improvement of intercity rail passenger services. It is, thus, readily apparent that the environmental issues which are of major importance have not been adequately and fully resolved despite the extensive record made subsequent to the oral hearing herein.

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[4] Cf. also, the national transportation policy, 49 U.S.C. *preceeding* § 901, regarding the need to promote safe service.

Turning finally to what is an important factor apparently overlooked by the majority, i.e., Federal-State (local) interactions, it should be noted at the outset that not only does the act limit this Commission's jurisdiction over purely intrastate matters, see, for example, section 303(j)(k), 49 U.S.C. 903(j)(k) but the Constitution of the United States, Amendment X, provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

The record clearly indicates the concern of the citizens of Greenport and others over the attempt by applicant to circumvent the wishes and long-term plans of the citizens of Greenport. Conceivably, such long-term plans may not be in accord with applicant's proposed commercial venture. Additionally, the progress and implementation of such civic planning may not be in agreement with applicant's plans. But the citizens of Greenport are entitled, within limits, to chart their own destinies without the intrusion of outside forces which may have little or no interest in the ultimate goals of those citizens. Cf. *Euclid* v. *Ambler Co.*, 272 U.S. 365, 389. In that respect, it is noteworthy that representatives of the citizens of Greenport, i.e., the Planning Board of the Village of Greenport, indicate that applicant has failed or refused to consult with that board as to its proposed operations in Greenport.

In summary, although the majority proposes to grant applicant a limited-term certificate, such action is not warranted on a number of important grounds. The procedural irregularities raise serious questions of denial of due process. Moreover, a grant of authority, even one for a limited term, presupposes that applicant has met its burden of proof both with respect to public need and fitness. But the record herein will not support a finding of a public need for the proposed service. Additionally, there can be no finding of fitness (safety) in the circumstances disclosed of record. The environmental issues though extensively considered herein remain largely unresolved. But in any event, a grant of the authority even with a limited-term certificate will clearly result in radical and major changes in the environment at several points. Finally, the desires of the citizens, primarily those of Greenport, to chart their own destinies through a careful planning process would be largely circumvented in the name of expediency and a desire for commercial exploitation.

In these circumstances, I believe that the most prudent course of action would be to deny the application but without prejudice to the filing of a new application when and if applicant can meet its burden of proof, among other problem areas.

Accordingly, I respectfully dissent from today's decision.

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APPENDIX A

FINAL ENVIRONMENTAL IMPACT STATEMENT

No. W-1270

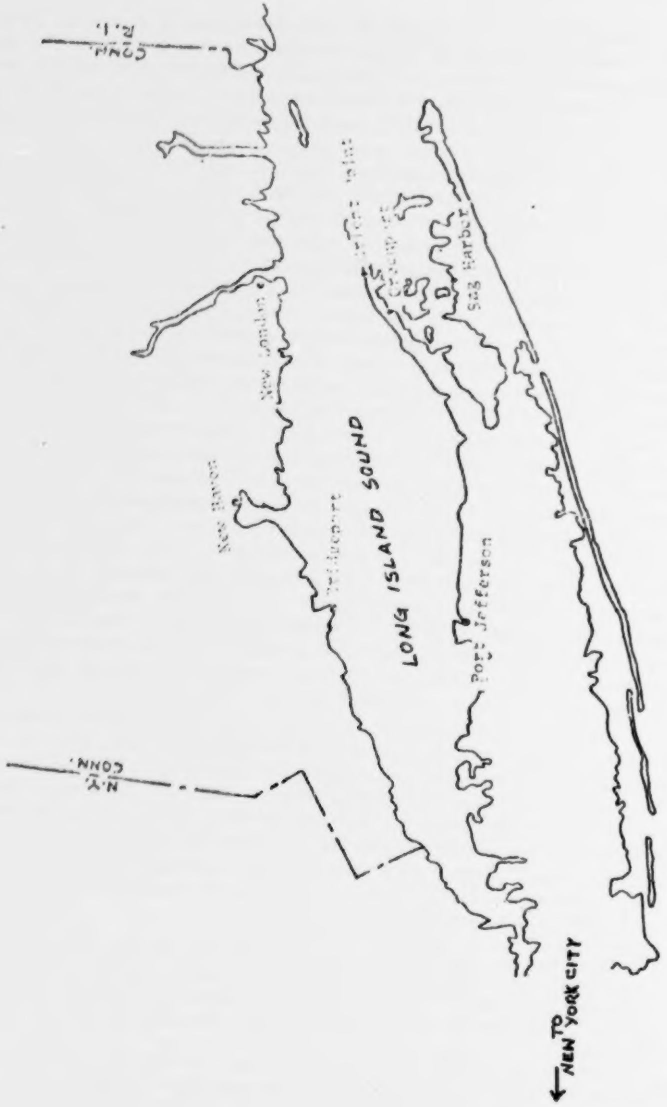
MASCONY TRANSPORT AND FERRY SERVICE, INC., INITIAL OPERATIONS—NEW LONDON TO GREENPORT, L.I., N.Y.

I. *Description of action*

Mascony Transport and Ferry Service, Inc., of New Bedford, Mass., seeks authority to commence operations as a common carrier by water between the ports of New London, Conn., and Greenport, N.Y. The purpose of the application is to provide ferry service across Long Island Sound for passengers, with or without automobiles, and trucks carrying commercial traffic.

Applicant alleges that its proposed service will result in a substantial conservation of time and energy for potential ferry users inasmuch as its proposed all-water route of 21.5 miles is considerably less than the approximately 200-mile highway route between the involved points. Two existing ferries conduct operations across the Sound and oppose the application primarily on the ground that an additional service is not justified by the public convenience and necessity. Cross-Sound, Inc. (which recently obtained the operating rights of New London Freight Lines), transports passengers and vehicles between New London and Orient Point, N.Y., a site located 8 miles east of Greenport (see figure 1). The Bridgeport and Port Jefferson Steamboat Co. (B&PJ) operates approximately 69 miles west of the site of the proposed operation, serving the ports of Bridgeport, Conn., and Port Jefferson, N.Y. Mascony alleges that existing service is incapable of meeting current demand, particularly during peak traffic periods.

FIGURE 1


CONN.
R.I.
New Haven
Bridgeport
New London
Orient Point
Greenport
Sag Harbor
Port Jefferson
LONG ISLAND SOUND
N.Y.
CONN.
TO NEW YORK CITY

PROCEDURAL HISTORY

The application was filed on May 29, 1973, and hearings were held on the matter at New London on October 29, 30, and 31, and November 1, 1973; at Greenport on December 10, 11, 12, and 13, 1973, and January 8, 9, and 10, 1974; and at Washington, D.C., on February 20, 1974. The Administrative Law Judge, in an initial decision served June 19, 1974, concluded (1) that public demand for ferry service between New London and eastern Long Island exceeded the capacity of existing services for a good part of the year, (2) that although excess capacity during the late fall, winter, and early spring could well result in increased fares, inferior service, or both, the user public was willing to assume this risk, and (3) that the ability of applicant to provide the proposed service deserved further investigation in view of potential safety problems at New London and environmental difficulties at Greenport. The Administrative Law Judge accordingly recommended that the application be denied on the ground that the record was not sufficiently developed to permit adequate consideration of the environmental impact of the proposed action, particularly with respect to the Village of Greenport, and of the safety problems associated with the New London docking site. Mascony filed exceptions to the initial decision along with a petition to reopen the record for receipt of additional evidence.[1]

By order served October 22, 1975, the Commission, Division 1, reopened the record for receipt of tendered additional evidence[2] and reopened the proceeding for further consideration in light thereof. The order of October 22, 1975, also directed that an evaluation of the environmental effects of the proposed service be made in accordance with the National Environmental Policy Act of 1969 (NEPA) prior to any further decision on the merits of the proceeding. In response to this directive, the Environmental Staff prepared a draft environmental impact statement which was served upon the parties and appropriate Federal, State, and local governmental agencies on February 3, 1976. Comments were received from several interested parties and agencies and this final impact statement was prepared based upon these comments, further consultation with government officials and other interested persons, and an analysis of the record in this proceeding.

As was pointed out in the draft, this statement is not intended to be the decisional document in the instant proceeding. The discussion herein will be limited to describing applicant's operating proposal and analyzing its environmental impacts. Therefore, it is not the appropriate forum in which to resolve such issues as the existence of a public need for the proposed ferry operation and the effect of an additional service on existing water carriers. These and other questions pertinent to a determination of whether the proposed service is required by the present or future public convenience and necessity will be ultimately dealt with in the Commission's subsequent decision on the merits.

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[1] It should be noted that Mascony filed applications to conduct the proposed service under temporary authority both prior and subsequent to the initial decision in this proceeding. These applications, which incorporated certain changes in applicant's operating proposal, were denied by the Commission's Motor Carrier Board by orders dated May 29, 1974, and May 22, 1975, respectively.

[2] Specifically, said tendered evidence included a New York Permit to improve the Greenport ferry slip, an agreement whereby applicant would utilize the New London municipal pier as a docking facility, and an amended operations plan for the Greenport docking site.

APPLICANT'S OPERATING PROPOSAL

Mascony has purchased four vessels from the Delaware River & Bay Authority (DRBA): the S.S. *New Jersey* (subsequently renamed the S.S. *Greenport*), the S.S. *Cape May*, the S.S. *Delaware*, and the M.V. *Cape Henlopen*. These vessels were used by the DRBA to provide ferry service across the Delaware River between Cape May and Lewes, Del., until dredging problems prompted the DRBA to seek vessels with shallower drafts.

Applicant proposes to utilize the *Cape Henlopen* and the *Greenport* for its proposed operations with the *Cape May* available as a backup vessel in the event one of its primary vessels is put out of service. The *Cape Henlopen* is a diesel-burning vessel approximately 320 feet long and 50 feet broad, with a draft of 3 feet forward and 10 feet at stern. Built in 1944, it was refurbished in 1955 and completely rebuilt in 1960. The *Cape Henlopen* has a passenger capacity of 600 and can carry a maximum of 80 standard-sized automobiles, or a mixed load of 60 automobiles and 5 tractor-trailers, on its six-lane automobile deck. It offers passengers such amenities as a snack bar, observation decks, rest room facilities, and passenger lounges. Holding-tank facilities will be installed to prevent the release of sewage into the Sound. Operating with a crew of 12, the *Cape Henlopen* will utilize 120 gallons of fuel per hour at a speed of 14 knots. The vessel has a displacement of 1,790 tons.

The *Greenport* (see figure 2) has an overall length of 350 feet, a breadth of 59 feet, and a 10' 6" draft. The vessel, which was constructed in 1936, lengthened and modernized in 1954, and refurbished in 1964, has a licensed passenger capacity of 800 persons. It can carry a maximum of 100 automobiles and a mixed load of 85 cars and tractor-trailers. The *Greenport* contains passenger amenities similar to the *Cape Henlopen's* and holding facilities will be installed before operations commence. A steampowered vessel, the *Greenport* burns approximately 360 gallons of fuel per hour at a speed of 15 knots and has a displacement of 2,758 tons. Capable of loading from either the bow or stern (as are all of Mascony's vessels), the ship will operate with a crew of 14. Mascony will spend a total of $100,000 on renovating the *Greenport*, the bulk of the improvements being cosmetic in nature.

FIGURE 2

Mascony's backup vessel, the *Cape May*, has the same vessel statistics, carrying capacity, and fuel consumption rate as the *Greenport*. Its displacement of 2,730 tons, however, is slightly less than its sister vessel. The *Cape May*, a steampowered vessel, was constructed in 1933, modernized in 1954, and refurbished in 1964. A new topside superstructure costing $1 million was added by the DRBA in 1970. Mascony does not plan to use its largest vessel, the S.S. *Delaware*, in service between New London and Greenport, and has offered said vessel for sale. The *Delaware* is 375 feet long and has the capacity to carry between 115 and 120 automobiles.

Mascony initially proposed to utilize docking facilities in New London located directly east of the Penn Central (ConRail) main line railroad tracks in the vicinity of the intersection of Bank and Sparyard Streets (see figure 3). As a result of objections expressed by the Connecticut Department of Transportation pertaining to the lack of safety devices over the track, and the probable creation of a public grade crossing across the Penn Central tracks in contravention of Connecticut and Federal law, applicant subsequently amended its operating proposal and leased space at New London's municipal pier, located at the foot of State Street approximately 1,500 feet north of its original site (see figure 3). However, Mascony intends to transact operations at the Bank and Sparyard Street location as soon as the operational difficulties regarding this site can be resolved to the satisfaction of the Connecticut DOT and Public Utilities Commission.[3] In view of this fact, this environmental study will include a discussion of both sites.[4]

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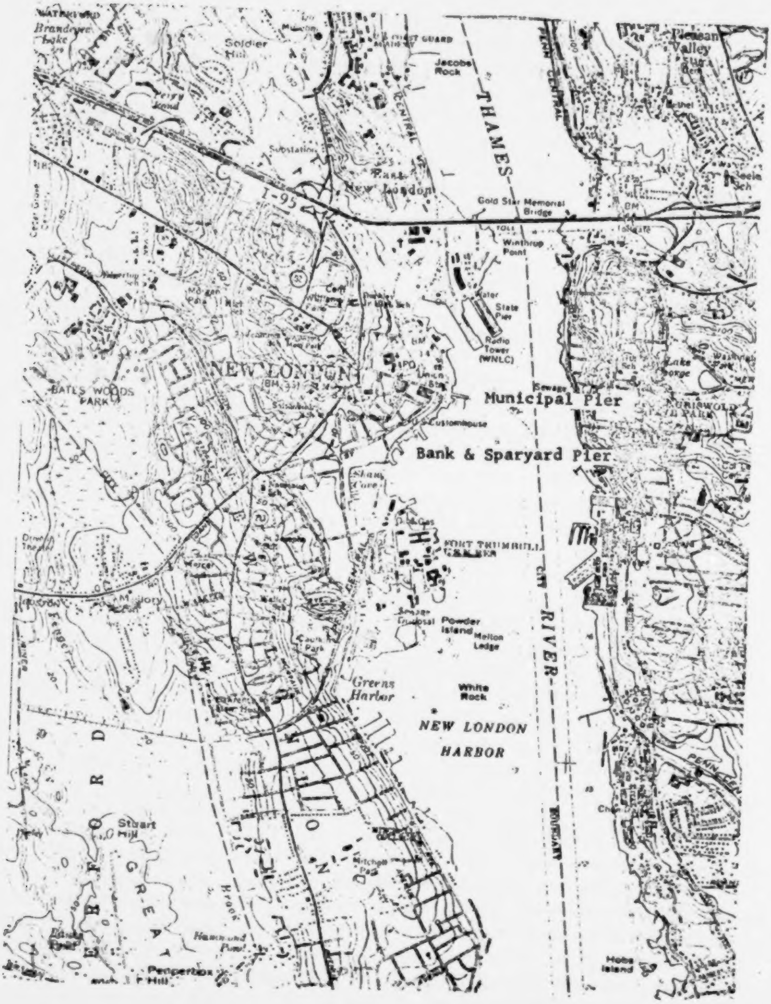
[3] Its lease on the municipal pier will expire on August 31, 1976, and does not include an option to renew. A New London City spokesman, however, has indicated that the city may extend the lease for a short period of time if use of Mascony's permanent location is imminent at the lease's expiration date.

[4] Under the Interstate Commerce Act, a water carrier can shift and otherwise change its docking facilities within the confines of a port without additional Commission authority. Consequently, there is a need to discuss alternative sites and operations.

FIGURE 3


Soldier Hill
Jacobs Rock
THAMES
Pleasant Valley
East New London
I-95
Gold Star Memorial Bridge
Winthrop Point
State Pier
Radio Tower (WNLC)
NEW LONDON
BATES WOODS PARK
Municipal Pier
U.S. Customhouse
Bank & Sparyard Pier
FORT TRUMBULL
Powder Island
Melton Ledge
RIVER
Greens Harbor
White Rock
NEW LONDON HARBOR
Stuart Hill
Pepperbox Hill
Hobs Island

The New London municipal pier is located directly east of the ConRail tracks, opposite the Amtrak passenger station. The pier, which extends 350 feet into New London Harbor and is 50 feet wide, was damaged by a tugboat collision several years ago and is unsafe for docking at its end. However, Mascony's vessels would dock adjacent to the pier at its basically sound north side. The only structure to be added to the pier would be a camel (a large log) tied to the north end of the dock. Mascony proposed to stage 60 passenger vehicles on the pier itself (40 feet of the pier's 50-foot width is available for such a purpose) and an additional 20 automobiles adjacent to the pier. Tractor-trailer units and excess automobiles would be staged adjacent to Mascony's Bank and Sparyard docking site and would be directed to the municipal pier via local streets just before boarding time. Mascony will construct a nonpermanent 45-foot ramp for loading and unloading of vehicles. Pedestrians will board by way of a walkway protected by pipe rail. Tickets will be sold upon boarding.

Ample facilities for overnight parking exist for those passengers desiring to leave their automobiles in New London. A municipal parking garage with space for 550 cars is located a short distance away from the municipal pier and additional parking facilities are available at the Bank and Sparyard site.

The bulk of the traffic embarking from New London is expected to enter the city by way of Interstate 95, approximately 1 mile north of the municipal pier, and will thus generally avoid entering the heart of the central business district. Access to the municipal pier will be by way of State Street across the ConRail tracks. State Street is a one-way thoroughfare with two traffic lanes and one parking lane. A fail-safe signaling device[5] is located at the railroad private grade crossing which also provides access to the adjacent Fishers Island ferry dock.

Mascony's original site near Bank and Sparyard Streets assertedly has the potential for parking and staging 213 vehicles. Mascony's option to purchase this 20,000-square foot parcel, which now accommodates a number of small buildings, expired in October 1974. Mascony met with the New London Redevelopment Agency (RDA) on April 7, 1976, regarding future acquisition of the property. As part of the Shaws Cove urban renewal plan, the RDA will purchase the property, improve it and then offer it for sale to potential commercial developers. If Mascony can demonstrate its fitness to finance and develop the property, RDA would consider selling the land to it for ferry purposes. It should be noted, however, that if other development proposals are filed they may be similarly entertained in determining the future use of the parcel. Utilization of the site as a ferry terminal would require demolition of certain buildings and hardtopping of the area. Mascony would also have to install a grade crossing across the ConRail tracks with a fail-safe signal to satisfy the Connecticut Department of Transportation and the State Public Utilities Commission. Mascony has applied to the State Public Utilities Commission for a permit to construct a grade crossing at the site but its application was denied without prejudice in view of the denial of the application in the instant proceeding and the failure of Mascony to obtain a permit from the State Department of Environmental Protection and the United States Army Corps of Engineers for the construction of dolphins in New London harbor and the installation of a new bulkhead.[6] If approval for a public grade crossing should ultimately be granted,[7] applicant will install a fail-safe crossing signal and station attendants along the tracks to direct traffic safely across. The rail right-of-way would be fenced off. Mascony plans to install dolphins adjacent to the stone jetty pier, install and maintain a sheet steel piling bulkhead to make the existing dock more uniform for use, and fill the area behind the new bulkhead with 1,915 yards of clean bank gravel.[8]

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[5] Such a device, hooked up to the circuity of the track, obstructs access to the track whenever an approaching train comes within a specified distance of the grade crossing it protects.

[6] Mascony's initial application to the Department of Environmental Protection proposed placing dolphins at the tip of the pier. This proposal was denied without prejudice on the ground that the ferry would extend into the secondary channel during loading and unloading and thus interfere (footnote continued on next page)

Mascony proposes to stage vehicles west of the railroad tracks and direct them across the tracks directly onto the ferry, which they will board by means of a nonpermanent 45-foot ramp. The major approach to the docking site would be by way of Bank Street, now a two-way thoroughfare with one parking lane and one traffic lane in each direction. Vehicles would make either a right or left turn from Bank directly onto the Mascony docking site. An alternate means of access to Mascony's property would entail making a left turn from Sparyard Street.

Applicant's mooring facility at Greenport extends approximately 350 feet into Greenport Harbor. The width of the proposed ferry slip ranges between 70 and 100 feet. Fourteen dolphins will be installed in the slip to accommodate vessels during docking and Mascony has been issued Tidal Wetlands and Stream Protection Permits and Water Quality Certification by the New York State Department of Environmental Conservation pertaining to said dolphin installation. However, it has not yet received approval from the U.S. Army Corps of Engineers for the project inasmuch as Corps action on Mascony's application has been suspended until a final decision on the instant operating authority application is issued. In view of the fact that the adjacent water level is a minimum of 11.5 feet deep at mean low tide,[9] dredging will not be necessary.

Mascony's proposed docking and terminal facility is located south of Front Street, between First and Third Streets. Applicant originally planned to dock 50 feet further west but potential interference with the Shelter Island Ferry which docks a short distance west prompted it to amend its operating proposal. Mascony owns two 11,000-square foot parcels at the corners of Front and Third Streets (see point A, figure 4), and Third and Wiggins Streets (point B), and a 20,000-foot parcel known as the Bohack Property (point C) abutting the Greenport Playhouse on Front Street. In addition, Mascony asserts it can renew its expired option to purchase a 20,000-foot parcel on Third Street north of Wiggins (point D) if additional space is needed for parking or staging. Applicant asserts that it has a valid lease on a large parcel extending from Front Street to its pier (point E) which it proposes to use for staging purposes. Mascony's legal interest in this property is challenged by Cross-Sound and the owners of the property, Harry and Pauline Mitchell. Mascony leased the property from Advine Realty Co. in February 1974, said lease to commence after approval of

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(footnote 6 continued)

with the navigation of the secondary channel by commercial and pleasure craft. The Memorandum of Decision suggested that Mascony amend its plan, which it has done. However, applicant has yet to submit a new application in view of the uncertain status of the instant operating rights application.

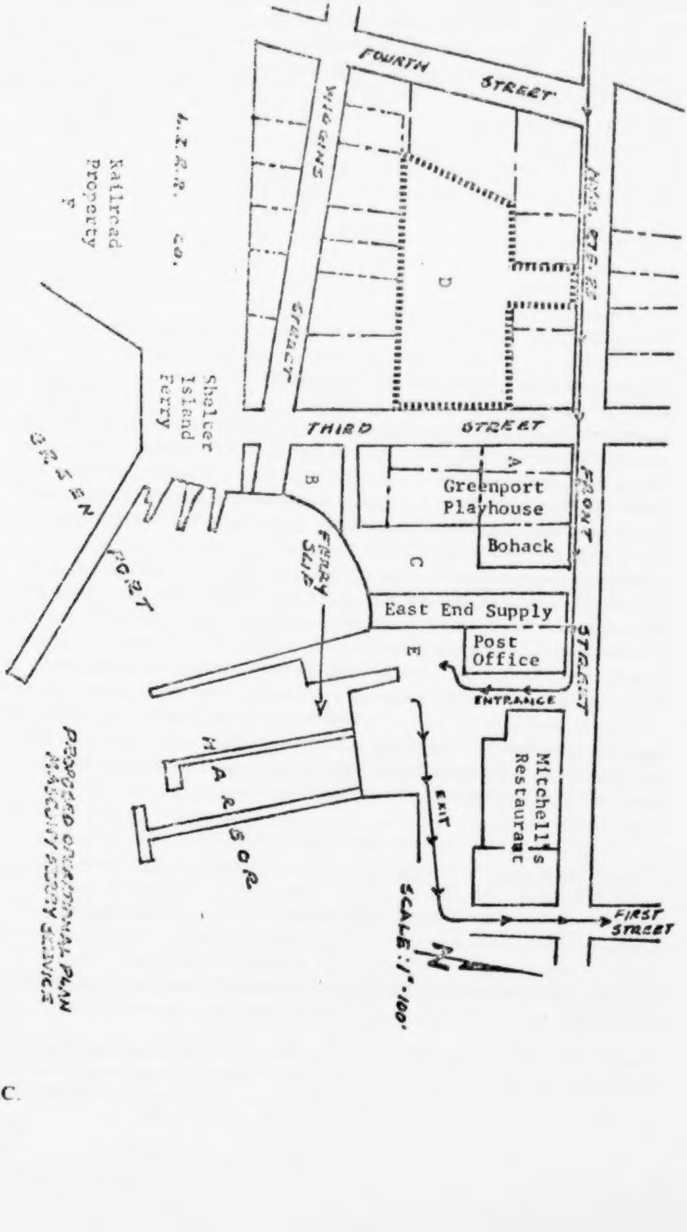
[7] Under 23 U.S.C. §322(a) (amended 1975), the Secretary of Transportation may allow certain private grade crossings to continue operating provided they are equipped with the best available protection. Pursuant to chapter 279 of the Connecticut General Statutes, the approval of the State Public Utilities Commission is required to change the use of and widen and install automatic protection at private grade crossings.

[8] Such improvements would be contingent on the approval of the State Department of Environmental Conservation and the Army Corps of Engineers.

[9] Report by Donald F. Carson, Hearing Officer, State of New York Department of Environmental Conservation, in Tidal Wetlands Application No. TW-15277-0053.

its application in the instant proceeding. Advine Realty owned the property pursuant to a purchase money mortgage from the Mitchells who subordinated their mortgage to Mascony's lease. Advine defaulted on the mortgage and the Mitchells foreclosed in January 1976. The Mitchells challenge the validity of Mascony's lease and are considering taking legal action to assert their position. Mascony also asserts that it acquired an 18-foot right-of-way behind Mitchell's restaurant to be used for exiting from the ferry landing area. The Mitchells claim that this right-of-way was cut off by the foreclosure sale. Resolution of these legal issues are beyond the scope of the instant environmental analysis, and the issues are presented herein primarily in response to comments received on the draft impact statement. Nevertheless, as Mascony's proposal contemplates using the disputed property, the analysis will focus on the environmental impacts associated with this location. However, potential alternative sites in Greenport which could be used in the event Mascony is unable to utilize its proposed site are also discussed in a subsequent section of this impact statement.

FIGURE 4


FOURTH STREET
WIGGINS STREET
L.I.R.R. CO.
Railroad Property
MAIN STREET
D
THIRD STREET
Shelter Island Ferry
A
B
Greenport Playhouse
Bohack
C
FERRY SLIP
FRONT STREET
East End Supply
Post Office
E
ENTRANCE
GREENPORT
HARBOR
Mitchell's Restaurant
EXIT
FIRST STREET
N
SCALE: 1" - 100'
PROPOSED OPERATIONAL PLAN MASCONY FERRY SERVICE

In addition to installing dolphins, Mascony will remove a dogleg extending from the end of the pier. Although no other structural improvements to the ferry slip are planned, a potential erosion problem exists with respect to Mascony's staging area which may eventually necessitate construction of new bulkheads.

In view of the fact that most potential ferry users are likely to be oriented from areas west of Greenport, the major access to the ferry slip will be by way of New York State Route 25, an east-west cross-Island highway which becomes Front Street in the vicinity of the ferry landing site. To gain access to the ferry, eastbound traffic will make a right turn off Front Street onto a 55-foot alleyway between the Post Office and Mitchell's restaurant (an unused banquet hall will be partially demolished to create the access corridor). Vehicles would then move directly into the main staging area prior to boarding the ferry. Traffic staged on one of Mascony's other properties would have to move north on Third Street to Front Street and then along Front Street to gain access to the 55-foot alleyway into the docking area since a lack of right-of-way over property owned by the East End Supply Company prevents access along the waterfront. Ferry traffic disembarking in Greenport would be routed in two directions. Initially, applicant proposed to direct all traffic onto Front Street through the 55-foot alley but then amended its proposal to provide for the use of First Street as an exist route. However, allegations by Village representatives to the effect that First Street's 72-year old sewer pipes, which are laid only a few feet below the road surface, could not withstand the weight of the heavy tractor trailers which the proposed ferry service would generate induced Mascony to further amend its operational proposal. Applicant now proposes to direct all commercial traffic to Front Street with passenger vehicles being divided between Front and First. Vehicles exiting through First Street would not be permitted to turn onto Front, being directed across that thoroughfare by attendants stationed at the intersection of First and Front. Traffic routed through First Street would move north to County Road 27 which serves as a bypass to State Route 25.

Mascony asserts it will be able to stage 100 vehicles in the area adjacent to the ferry slip, 50 vehicles each on its Front and Third and Wiggins and Third properties, and 100 vehicles on the Bohack property. Overnight parking facilities would be available at Mascony's Third Street properties. Loading and unloading of vehicles would be accomplished by means of a 40-foot ramp extending from the bow of the ship. Passengers would board by means of a gangway extending from the side of the vessel.

Mascony proposes to operate all year round, the number of daily trips to depend upon the particular season of the year. It will utilize one vessel, the *Cape Henlopen*, the entire year, supplementing it with the *Greenport* during the 66-day summer peak period. The proposed schedule is listed below:

January 1st to April 29th

Leave New London	*Arrive Greenport*	*Leave Greenport*	*Arrive New London*
8 a.m.	9:30 a.m.	10:00 a.m.	11:30 a.m.
6 p.m.	7:30 p.m.	-------	--------

(The 8 a.m. departure would alternate between Greenport and New London every other day.)

April 30th to July 29th

Leave New London	*Arrive Greenport*	*Leave Greenport*	*Arrive New London*
8 a.m	9:30 a.m.	10:00 a.m.	11:30 a.m.
6 p.m	7:30 p.m.	8 p.m.	9:30 p.m.

July 30th to October 3d

Leave New London	*Arrive Greenport*	*Leave Greenport*	*Arrive New London*
6 a.m	7:30 a.m.	6 a.m.	7:30 a.m.
8:15 a.m	9:45 a.m.	8:15 a.m.	9:45 a.m.
4:00 p.m.	5:30 p.m.	11:15 a.m.	12:45 p.m.
7:15 p.m.	8:45 p.m.	7:15 p.m.	8:45 p.m.

October 4th to December 31st

Same schedule as January 1st to April 29th.

It should be noted that Mascony may expand its schedule to four round trips daily during June or July if demand warrants.

Applicant projects that it will be operating at 30 percent of capacity from January 1 to April 29, 40 percent of capacity from Arpil 30 to July 29, 60 percent of capacity during the July 30 to October 3 peak season, and 35 percent of capacity the rest of the year. Mascony estimates that it will book 66,385 vehicle spaces (95 percent passenger and 5 percent commercial vehicles) and carry 300,000 passengers annually. Applicant arrived at this figure by averaging New London Freight Lines ridership during the first and last 3 weeks of operation in 1972 and taking into consideration the high number of turnaways observed during peak season.[10] Based on a survey of riders in the Connecticut DOT preliminary report, it is anticipated that the ferry will be used primarily for social or recreational purposes and on an irregular basis. Mascony's projected traffic mix of 95 percent passenger and 5 percent commercial vehicles is also based on the past experience of its putative competitor. However, Mascony anticipates a large volume of seed potato traffic (approximately 800 tractor-trailer units) moving between Long Island and Maine during February and March, a time during which passenger use will be at its lowest.

In contrast to Mascony's proposal, Cross-Sound's existing service is characterized by smaller vessels making more frequent sailings. Cross-Sound operates five vessels, the M.V.'s *Orient, Plum Island, Manisee, Manitou,* and *Caribbean Ferry,* with vehicle-carrying capacities ranging between 12 and 24. Between one and three vessels are in service simultaneously, depending upon the time of year. Cross-Sound's 1976 schedule is divided into three segments. During its spring and fall schedules (April 30 through June 10 and September 20 through October 31), Cross-Sound sails seven times daily from both New London and Orient Point. Its summer schedule (June 11 through September 19) lists 11 departures from each port, with one additional trip on Fridays and Sundays from July 2 through September 12. Cross-Sound's winter schedule (January 1 through March 11 and November 29 through March 1977) is characterized by three departures from each port on weekdays and four daily departures on weekends. Protestant also schedules four sailing a day from March 12 through April 29, seven daily trips on Easter, Christmas, and New Year's weekends and five daily trips on Memorial, Columbus, and Thanksgiving weekends. Cross-Sound's predecessor, New London Freight Lines, had not previously transported truck traffic during the winter months but Cross-Sound began doing so when it began operations in March 1975. Ferry service for trucks, however, is primarily dependent on the availability of the two larger vessels, the *Orient* and *Plum Island*, although the *Caribbean Ferry* can carry a limited number of commercial vehicles.

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[10] The Connecticut Department of Transportation, Bureau of Planning and Research recorded 150 vehicles turned away on August 16 and 124 turned away on August 18, 1972, in a preliminary report analyzing the Orient Point ferry.

B&PJ transports passengers and vehicles on the M.V. *Martha's Vineyard*, a 202-foot-long vessel with a 50-foot beam. The *Martha's Vineyard* has a 33-vehicle and 1,061-passenger capacity and runs from May 25 to October 14, making between three and five round trips daily depending upon the season and day of the week.

From March 22, 1975, the date Cross-Sound commenced operating the Orient Point Ferry, to November 30, 1975, it has carried 62,549 vehicles and 120,174 passengers between Orient Point and New London. Based on volume capacity supplied by protestant, this traffic is equivalent to an average of 15 percent of passenger and 70 percent of vehicle capacities for scheduled runs (see table 1). Unlike its predecessor, Cross-Sound accepts reservations.

TABLE I

Cross-Sound Ferry Service, Inc., 1975 capacity and traffic statistics

Month		Capacity	Traffic handled
March[1]	Passengers	14,920	2,038
Do	Vehicles	[2]1,580	[2]907
April	Passengers	44,760	4,705
Do	Vehicles	4,740	2,541
May	Passengers	57,892	9,542
Do	Vehicles	9,758	5,576
June	Passengers	117,600	15,254
Do	Vehicles	13,056	8,303
July	Passengers	163,680	27,482
Do	Vehicles	15,872	12,640
August	Passengers	163,680	32,686
Do	Vehicles	15,872	14,553
September	Passengers	127,800	12,718
Do	Vehicles	13,632	9,047
October	Passengers	58,280	9,794
Do	Vehicles	9,920	5,974
November	Passengers	45,536	5,955
Do	Vehicles	5,064	3,088

[1] Operations commenced March 22, 1975, under temporary authority pending approval of transfer of operating authority from previous owners to Cross-Sound Ferry Service, Inc.

[2] Vehicle capacity is measured in terms of conventional passenger vehicles. In calculating traffic handled conventional passenger vehicles are each counted as one vehicle and trucks are counted as three vehicles each since a 55-foot tractor-trailer combination occupies three passenger vehicle spaces. Since many of the trucks handled were actually less than full size tractor trailers the figures shown for vehicle traffic handled are somewhat overstated.

Source: Cross-Sound Ferry Service, Inc.

II. Relationship to land use plans, policies, and controls

A. *Greenport.*—The Village of Greenport is part of the town of Southold which comprises the major portion of the north fork of eastern Long Island, bounded by Long Island Sound on the north and Peconic and Gardiner's Bays on the south. The area is predominantly agricultural, the primary crop being potatoes, with generally uniform topography of gentle to moderate slope. In addition to its extensive farmland, the most important physical feature of the township is its many miles of waterfront. Greenport is located on the south shore of Southold and has one of the three deepwater ports on Long Island outside of New York City. The dredged channel has a depth of 40 feet. Because of its harbor, Greenport has become a prominent fishing village (the major catch being shellfish) and the site of fish-packing and canning industries as well as a popular port of call for pleasure craft. The predominant form of land use in the Village is the single-family residence which accounts for over 25 percent of the Village's developed land. While some two-family and multiunit buildings do exist in the village, the majority of residences are large, old structures on relatively large plots of land. Commercial activity is concentrated along Front Street between Third and Main Streets and Main Street between Front and the waterfront. Most commercial activity is devoted to retail and marine-related businesses with less than 2 percent of the village being subjected to industrial and heavy commercial use. Most of this commercially devoted acreage is concentrated along the waterfront and the Long Island Railroad tracks. According to the Village Comprehensive Development Plan, only 4 percent of the Village's gross land area (approximately 20 acres) is available for development.[11]

Although the population of Suffolk County has skyrocketed during the past 20 years, and that of Southold has increased moderately, the population of Greenport has declined by 18 percent, from 3,082 in 1950 to 2,481 in 1970. There are proportionately more persons in the 45 years or older age group residing in the Village than in the county as a whole, the average age of Village residents being approximately 38 years.[12] The indications are, therefore, that in addition to its resort town character Greenport is viewed by some as a desirable retirement community.

Suffolk County has been designated a depressed area eligible for full financial assistance by the United States Department of Commerce, Economic Development Administration. In addition, the Village of Greenport has been labeled a depressed area by the county because of its higher unemployment rates, lack of new municipal facilities, and lower family income.[13] Village planners assert, however, that conditions have improved in recent years as increased tourism has invigorated the Village's economy. The Village Comprehensive Development Plan seeks to take advantage of Greenport's natural features and build upon its success as a summer resort. The plan recommends promotion of maximum use of the Village's waterfront facilities and development of a diversity of water-oriented activities. A pedestrian mall which would be closed to vehicular traffic is recommended for Adams Street, a block north of Front Street. The plan recognizes the adverse effect of on-street parking on Front Street upon efficient vehicular flows and proposes adding approximately 300 public off-street parking spaces, as well as widening key thoroughfares. The plan proposes to enhance the waterfront area by constructing landscaped pedestrian walkways leading onto the waterfront and filling in boat slips for recreational use. Implementation of the specific recommendations made in the plan, however, is speculative. The Village is considering plans for a marine museum, to be known as the Greenport Aquaseum, to be constructed and operated by the Middle Atlantic Natural Science Council, Inc. Although Mascony has offered the Council its building on the Bohack property on Front Street for museum purposes on the condition its operating rights application is approved, the Village Board is expected to make available a 5-acre parcel on Moores Lane, approximately 1/4 mile northwest of the business district. Use of this site, which has been approved by the Aquaseum's Board of Directors, would contemplate parking facilities at the museum and a shuttle bus service between the site and downtown Greenport. The museum will be built in modular fashion with expansions planned in the event additional funding becomes available. It is initially expected to attract a minimum of 50,000 visitors annually, primarily from Nassau, Suffolk, and Queens Counties, N.Y. The museum could, however, also attract tourists from southeastern New England. Current tourist attractions in the Village include an Oyster Festival 1-day each year in October and a 1-day art show during the summer season. An in-the-water boat show which would run for 2 weeks is in the planning stages.

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[11] Data for this paragraph was obtained from the Comprehensive Development Plan, Town of Southold, Village of Greenport, part I.

[12] Source: 1970 census data.

[13] 1970 median family income for Greenport was $8,664, compared to $9,949 for the Town of Southold and $12,084 for Suffolk County. Source: 1970 census and Suffolk County Planning Commission.

Existing land use for the area directly adjacent to the ferry is zoned waterfront commercial. The Shelter Island ferry, which transports passengers between Greenport and Shelter Island in 85-foot-long and 30-foot-wide vessels, docks approximately 300 feet to the west. The area adjacent to the proposed Mascony site on the east is devoted to marina use and houses small fishing and pleasure craft (see figure 4).

Although the proposed ferry service would bring a large number of tourists into town from the New England area, members of the Greenport Planning Board assert that the ferry would be inconsistent with the Comprehensive Development Plan and would seriously alter the character of the Village. They allege that traffic generated by the ferry will clog village streets to such an extent that residents of nearby villages and regular summer tourists will avoid coming into Greenport. It is further alleged that unlike the regular tourist trade, ferry travelers will perceive Greenport solely as a connection between New York and New England and, consequently, will not patronize Village buisness establishments. Mascony's utilization of its present site, while consistent with the area's present zoning classification of waterfront commercial, would be inconsistent with Greenport's plan to develop its waterfront area for recreational uses or as a location for off-street parking for village shops. It is contended, therefore, that the ferry will hinder rather than promote the Village's development as a resort town.

Members of the Village Planning Board indicate that alternative docking sites would be less disruptive to the Village's development plans to the extent they avoid placing ferry traffic in the heart of the Village commercial district. The only alternative site to be given serious consideration thus far is an area south of the Long Island Railroad pier located approximately 500 feet west of Mascony's present location (see figure 4, point F).

Greenport is the easternmost terminus of the Long Island Railroad on the north fork of Long Island. During the 19th and early 20th centuries, the railroad operated a car ferry service transporting both passengers and rail freight from this pier to New England. The service was abandoned in 1930 and the pier has remained unutilized since that time. The railroad owns approximately 100,000 square feet of property, including a passenger depot and the land underlying the tracks. Current railroad service to Greenport is infrequent with only two passenger trains entering and leaving the station each day. Use of the approximately 61,000 square foot area south of the pier would not only eliminate potential navigational problems associated with Mascony's currently proposed site but would also alleviate much of the traffic problem which would arise from diverting ferry traffic directly into the center of town. Staging for the ferry could take place on the unused railroad property itself or on the nearby Mascony properties. The parcel now is encumbered by unused trackage and a turntable, both of which the railroad intends to remove regardless of the future disposition of the land. While there would be some disruption to residential uses adjacent to the traffic approach to the railroad site, the impact on the town in general would be substantially less severe. The railroad has no objection to leasing its property for ferry purposes providing that its right to future use of the property can be preserved. Although the Village has the right to utilize the south side of the railroad pier for docking of fishing or pleasure boats, it does not now contemplate such use and would prefer to convert the pier to a fishing wharf or pedestrian dock. It is not optimistic, however, about obtaining funding for such a project. Access to the Long Island Railroad property could be provided by way of Fourth Street which crosses Front Street west of Third. Fourth Street is a two-way road with approximatley 50 feet of cross section. A grade crossing would have to be constructed over the railroad tracks to reach the property. Use of this site, however, would require installation of a steel sheeting bulkhead, dredging (the depth of the water being only 3 feet), and filling in a washed out portion of the pier. Docking would consist of a drag line operation from the beach. The above-mentioned alterations would require a permit from the U.S. Army Corps of Engineers and the State Department of Environmental Protection.

Other potential alternative docking sites exist in the extreme eastern part of the Village, north of the commercial district. These sites, also zoned waterfront commercial, are located adjacent to residential areas. Utilization of these sites would result in less congestion than in the downtown area but would entail potentially more interference with residential use. It is not known whether sufficient land would be available in these areas for staging and parking purposes.

B. *New London.*—New London, a city of 31,360 persons, is situated in southern New England, roughly midway between New York City and Boston. The city is located on the west bank of the Thames River at the entrance to Long Island Sound, which bounds the city on the south. New London is a shipbuilding and manufacturing center whose major products include pharmaceuticals, printing presses, engines, paper products, and furniture. Its economy is based primarily on defense industries and services employment. Because of its harbor, one of the deepest on the Atlantic coast, New London developed as a whaling and sealing port in the 19th century. The city's extensive waterfront (totaling 5.5 miles) is still considered to be its most valuable natural asset and houses three other ferry services besides the one proposed by Mascony—the Orient Point, Fisher's Island, and Block Island ferries. The U.S. Navy Submarine Base maintains 17 piers and the harbor is used extensively by Navy and Coast Guard vessels. New London is the site of the U.S. Coast Guard Academy as well as several national historic sites. New London experienced a decline in population between 1960 and 1970, due largely to outmigration to the suburbs. Current land use is primarily high-density residential with some high-density mixed urban concentrations and intensive institutional uses.

The municipal pier at the foot of State Street is part of a planned multimodal transportation terminal to accommodate interchange between automobile, rail, bus, ferry service, and taxi linked to air commuter service at the City's Trumbull Airport. The city has developed a 550-car municipal parking garage to support such development and has proposed several improvement projects designed to facilitate coordination between the various transport modes. It has applied to the State Department of Transportation for financial assistance in implementing these plans. Proposed projects include the development of a bus terminal adjacent to the municipal garage, construction of a pedestrian bridge to connect the garage to the train platform and, eventually, to the various ferry landings, and in the long term, development of physical links to the ferry services, removal of Penn Central spur tracks, and overall development of the waterfront. Thus, location of the proposed ferry service at the municipal pier on an interim basis would be consistent with city plans in the area.

Mascony's primary site at Bank and Sparyard Streets is located within the Shaw's Cove area, a district scheduled for urban renewal. Plans call for rehabilitation or demolition of buildings and widening of streets in the area surrounding Mascony's property. Bank Street, the major artery carrying traffic to and from the proposed service, would be widened and converted to a one-way thoroughfare northbound. Eugene O'Neill Drive, a major connector between Interstate 95 and the waterfront, will be extended to connect with Tilley Street at a point one block west of Bank Street in the vicinity of the proposed terminal and will be converted into a one-way throughfare southbound. Blighted waterfront property will be reclaimed in an effort to reestablish the area for pedestrian and marina use. At the present time much of the area around the waterfront has been left to deteriorate and is unsuitable for recreational purposes. Rehabilitation has already begun and institution of the proposed service in the Shaw's Cove area is expected to assist in the area's rejuvenation.

In order for the city to obtain funding for this urban renewal project from the U.S. Department of Housing and Urban Development, it must make some provision for protecting Shaw's Cove against hurricane-induced floods. Consequently, the City Redevelopment Agency is working with the U.S. Army Corp of Engineers in planning construction of a hurricane barrier along the Shaw's Cove waterfront. The plans for this project have undergone several revisions and are still conceivably subject to change. The current plan, as described in a Corps of Engineers' final environmental impact statement issued in April 1976, contemplates construction of approximately 2,800 feet of earth berm from 12 to 14.5 feet above mean sea level to be connected by approximately 300 feet of "L" wall with a top elevation of 14.5 feet. The proposed project is expected to provide flood protection for approximately 45 acres in the Shaw's Cove area.

The present plan would affect access to Mascony's Bank and Sparyard docking site since it calls for construction of the "L" wall between the ConRail tracks and Bank Street, thus cutting off Mascony's staging area from the pier. The only access to the waterfront would be by way of a ramp which would allow vehicles to drive over the berm and "L" wall at Sparyard Street. The ramp would connect to a service road approximately 24 feet wide with one traffic lane in each direction. This road would serve properties located between the railroad tracks and the harbor. The New London RDA indicates, however, that actual construction of the hurricane protection project may be approximately 2 years away and that plans could be revised to accommodate landowners along the waterfront.

The proposed use of the Bank and Sparyard property by Mascony is not consistent with the Federal Railroad Administration's general policy to eliminate private grade crossings along the northeast rail passenger corridor between Washington, D.C., and Boston. This policy is designed to carry out the goals set forth in Title VII of the Railroad Revitalization and Regulatory Reform Act of 1976 (Public Law 94-210). This part of the act directs the Secretary of Transportation to improve high-speed rail services in the Northeast corridor in terms of speed and reliability of service as well as safety. A study performed for the FRA by the Bechtel Corporation recommended that all but three of the private grade crossings in New London be abolished to help meet this goal. Abolition of the private grade crossing across Mascony's proposed Bank and Sparyard site would require permission from the State Public Utilities Commission which would hear the matter pursuant to a petition filed by FRA. Inasmuch as the FRA would propose to purchase the crossing from the appropriate landowner prior to dissolving it, implementation of its plan depends on whether budgetary funds can be made available.

Finally, the New England River Basins Commission has issued a study entitled "People and the Sound: A Plan for Long Island Sound." The report, a cooperative effort prepared by a team of Federal, State, and Regional agencies, local citizens, and the scientific community recommends that a long-range management program be developed to protect critical environmental areas along the shore and assure opportunities for greater public access to use of the Sound. More specifically, it adopts the policy that public transit to and from shorefront facilities should be encouraged to minimize the current near-exclusive reliance on automobiles. The report recommends a State-subsidized mid-Sound crossing between New Haven and Shoreham. In addition, the report recommends development of small passenger ferries or launches to enhance recreational access to beaches. To the extent that the plan indicates a need for an additional ferry service, Mascony's proposal would be compatible. However, if a New Haven-Shoreham service was to be instituted (this is admittedly speculative), the operations of Mascony from New London and Greenport could adversely affect the viability of such a service.

The report also recommends that steps be taken to protect certain scenic townscapes, including Greenport, and that a public marina be developed in Greenport Harbor. Institution of ferry operations may be inconsistent with these general plans, should they ever be implemented.

III. *Environmental impacts*

A. *Traffic congestion.*—The proposed service will result in increased vehicular traffic in both of the involved localities, creating possible traffic flow problems. Applicant's Bank and Sparyard site in New London is in the midst of the Shaw's Cove urban renewal area where the local highway system is being improved. As a result of redevelopment, an alternate one-way north-south street system with 36 feet of cross section in each direction will be available between the proposed ferry landing and Interstate 95. This arrangement will increase highway capacity to such a level that the traffic likely to be generated by Mascony would be insignificant in comparison to such increased capacity. The initial configuration of Bank Street and O'Neill Drive, the most likely access and egress routes to the ferry site, is contemplated to be two 12-foot travel lanes and one 12-foot parking lane. Estimated urban intersection approach service volumes for one-way streets with parking on one side approximate 2,400 vehicles per hour green for this highway configuration.[14] When the growth of traffic warrants, the street configuration will be changed to three 12-foot travel lanes. Table

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[14] "Highway Capacity Manual," HRB 87, Highway Research Board (1965), figure 6.6. "Vehicles per hour green" indicates the number of vehicles which move through an intersection for each hour the traffic signal is green in a given direction. Thus, if the signal is green half of the time in each direction, the number of vehicles crossing the intersection in each direction would be measured over a 2-hour period.

6.5 of the Highway Capacity Manual estimates approach service volumes for such a configuration to be 3,200 vehicles per hour green. Both of the volumes mentioned assume Level of Service D (traffic approaching unstable flow), and additionally assume 10-percent left turns, 10-percent right turns and 5-percent trucks and through buses. Since the streets under consideration are the major arterials in the area, it can be assumed that they would have priority in the signalization pattern. With 75-percent green time for these two major highways, the resultant approximate capacities would be 1,800 vehicles per hour in the two through lanes. It should be pointed out that these values are for comparison purposes only to approximate the volume of the proposed street configurations.

The final design of the street system, particularly within the area of the proposed ferry operation, is incomplete. Such undecided design elements as the final transition curve from Bank Street to the station with related questions of property acquisition and the possibility of a pedestrian bridge over the highway to the municipal parking lot, could result in variations in street widths and the final highway capacity in this area. The final decision on the matters is expected in the summer of 1976. The capacities discussed above, however, should be accurate estimations of the actual capacities which can be accommodated on these streets. Inasmuch as the capacity of the *Greenport* is 100 automobiles and that of the *Cape Henlopen* 80, a capacity ferry load discharged into the traffic stream would comprise approximately 4 percent of the three through lane highway capacity. Current traffic figures for the involved area indicate that existing volumes do not approach capacity. Peak hour volumes for northbound traffic on Bank Street at its intersection with Tilley range between 329 (a.m.) and 521 (p.m.) vehicles per hour while southbound volumes range between 514 (a.m.) and 525 (p.m.) vehicles.[15] Additional peak hour volumes in the area are:

	a.m.	*p.m.*
Bank Street (left turn on Tilley)	69	60
Bank Street (right turn on Tilley)	19	36
Tilley Street (left turn on Bank)	23	55
Tilley Street (right turn on Bank)	57	111

However, in view of the significant changes to traffic circulation patterns and the adjoining land use which will result from urban renewal, such figures are not reliable indicators of postrenewal traffic levels. Bank Street will become a one-way thoroughfare northbound, precluding its use as an access route for southbound travelers coming off of Interstate 95. Access to the ferry from I-95 will be by way of O'Neill Drive southbound into Tilley Street eastbound and across Bank Street to the landing site.

A greater potential for traffic congestion exists at the municipal pier site. The Orient Point ferry, now located a half-mile south of Mascony's Bank and Sparyard landing site, plans to relocate a short distance north of the municipal pier, adjacent to the Block Island Ferry landing site. The Fishers Island ferry now docks at the other side of the municipal pier. This concentration of ferry services in an area which will also contain a bus and railroad terminal may result in traffic tieups during the summer peak. Traffic may also back up on State Street if vehicles seeking to enter the staging area are blocked by train arrivals and departures. However, major traffic congestion is not anticipated and delays associated with off-loading traffic during this time are not expected to be intolerable. Current peak hour traffic volumes for State Street in the vicinity of the railroad tracks range between 414 (a.m.) and 534 (p.m.) vehicles per hour, below the road's capacity. It should also be noted that potential traffic problems pertaining to the municipal pier location will be temporary in nature because of the interim status of the site.

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[15] Source: New London Redevelopment Agency.

Conditions in Greenport, on the other hand, present potentially serious traffic problems in the event Mascony operates from its proposed site between First and Third Streets. While there is a lack of specific data necessary to perform a detailed analysis of the traffic impact of the proposed service upon Greenport, certain qualitative evaluations can be made and are the subject of the following discussion.

In view of the fact that access to the ferry slip from Third Street is blocked by the lack of an easement across the property of the East End Supply Company, Front Street eastbound traffic must use the 55-foot alley between the Post Office and Mitchell's Restaurant to reach the primary ferry staging area. This alleyway is of sufficient width to accommodate the turning radii of the vehicles using it. While there may be sufficient storage space in the primary staging area for most sailings, passengers wishing to leave their cars behind would most likely park at one of Mascony's Third Street parcels.

Much of the traffic landing in Greenport will exit by way of First Street proceeding north. Such traffic would then probably continue along First Street until its end at Main Street and then take Main Street to reach County Route 27, an east-west oriented road north of the village. All commercial and the remaining automobile traffic will be routed out through the 55-foot alleyway, with the bulk of these vehicles making left turns onto Front Street westbound.

Front Street in the vicinity of the proposed ferry landing site carries two-way traffic with two parking lanes in 33 feet of cross section. While no definitive breakdown of this cross section was available, photographs indicate each of the two travel lanes to be approximately 9.5 feet wide and the parking lanes 7 feet wide. First and Third Streets are both approximately 50 feet wide and accommodate two-way traffic with two travel and two parking lanes.

Calculation of the actual volume capacity on Front Street is difficult since narrow lanes, two-way traffic, parking, and frequent turns are all physical or operational factors which detract from optimum capacity.[16] However, NYS Route 25, from NYS Route 114 to Main Street, has been assigned a design hour level of 330 vehicles by the Traffic Section of the New York State Department of Transportation, Region 10 Planning and Development Division.[17] Although more vehicles can be accommodated at lower levels of service, such levels result in lower operating speeds, traffic stoppages, and other congestion-related problems, including accidents. A traffic study for the Village of Greenport performed by the Suffolk County Traffic Safety Department in October 1974 shows traffic volumes on Front Street during August reaching levels of between 380 and 400 vehicles per hour. The Study describes traffic conditions at this time as congested and such levels may reflect an approximation of the ultimate capacity of Front Street. These high levels of traffic contribute to the occurrence of the majority of traffic accidents in the village on Front Street at the intersections with Main, First, Third, and Fifth Streets,[18] in the area of Mascony's proposed ferry landing.

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[16] See Highway Capacity Manual, *supra*.

[17] This corresponds to estimates of the capacity of Front Street "with a decent level of service" made by the Suffolk County Traffic Safety Department.

[18] Comprehensive Development Plan for the Town of Southold, Village of Greenport, Part I, following p. 49.

The traffic counts taken by Suffolk County in its study are purported to be typical of summer weekends and are alleged not to be significantly different from summer weekdays. These counts show a midday peak with the design hour volume being exceeded between 10:30 a.m. and 6 p.m. The traffic problems in Greenport are most prevalent in the summer months, with off-season levels approximating half of those reached in the summer peak season. The major problem areas are located east of Third Street in the business district, with traffic flow problems diminishing west of this intersection.[19]

During periods of peak ferry demand, it is likely that a significant portion of Front Street eastbound traffic would consist of vehicles destined to the ferry site. At Mascony's projected average of 60 percent capacity during the peak season an average of between 50 and 60 vehicles would be destined for the ferry staging area with numerous other vehicles moving toward the passenger-only parking areas. Through adequate signing many of the latter could be diverted off of Front Street at Fourth and by way of Wiggins to the parking area at Third and Wiggins. However, by so doing Mascony runs the risk of interfering with Shelter Island Ferry traffic in the area.

A 60-percent capacity load on the Greenport would consist of 60 vehicles or 18 percent of the design hour volume eastbound on Front Street. However, for a highway situation similar to Front Street, the number of right turns which must be made into the 55-foot alleyway will have the effect of reducing the highway capacity. If capacity at service level D is assumed to be 330 vehicles on Front Street, this reduction for 60 vehicles would be by an estimated 8 percent (i.e., 330 to 304).[20] For those times when the *Greenport* is operating at full capacity, the capacity of Front Street would be reduced by an estimated 15 percent, to 280. The 100 vehicles would then represent approximately 36 percent of the road's capacity.[21]

Traffic exiting from the ferry onto First Street would reach volumes similar to traffic approaching on Front Street and would have to compete with Front Street traffic at a nonsignalized intersection (although Mascony has proposed to station attendants at this intersection the Village of Greenport has challenged its authority to do so). The use of the 55-foot alleyway by exiting traffic making a left turn onto Front Street westbound would result in stoppage of both lanes of traffic on the street during any period of heavy traffic flow.

In view of the fact that Wiggins is one-way eastbound, cars parked in one of the Third Street parcels must exit by way of Third Street, entering the traffic stream with vehicles using the Shelter Island Ferry. In addition, the traffic on Third would be competing with the traffic on Front Street at their signalized intersection.

Table 2 shows the proposed summer schedule of Mascony with corresponding traffic volumes at the Third Street-Front Street intersection for a "typical" summer weekend. It should be noted that should Commission approval be granted for the proposed service, the Commission will have no control over its scheduling.

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[19] Source: Suffolk County Traffic Safety Department.

[20] Source: Highway Capacity Manual, *supra*, table 6.4.

[21] Although Mascony has expressed a willingness, in conversations with Environmental Staff members, to limit trips to 50 percent of capacity in peak season, such a proposal does not appear to be feasible. Not only would such a plan alienate customers, but it would fail to alleviate traffic congestion caused by cars destined to the ferry landing. In fact, there may be an even more adverse impact if these cars are turned back onto Front Street instead of boarding the ferry.

TABLE 2

Mascony proposed schedule		Hourly volumes			
		Front Street		Third Street	
Ferry leaves	Ferry arrives	Eastbound	Westbound	Northbound	Southbound
6 a.m.		30	17	10	5
	7:30 a.m.	150	90	30	13
8:15 a.m.		206	128	40	20
	9:45 a.m.	295	210	80	60
11:15 a.m.		360	270	110	85
	5:30 p.m.	320	360	135	60
7:15 p.m.		270	270	115	45
	8:45 p.m.	245	250	112	40

Source: "Traffic Study, Village of Greenport," Suffolk County Traffic Safety Department (1974).

Two ferry events, the 11:15 a.m. departure and the 5:30 p.m. arrival, appear to present potentially the most serious traffic problems for Greenport with two other events posing additional difficulties. At the time of the 11:15 departure, Front Street traffic moving eastbound already exceeds the design hour volume during the summer months. In view of the fact that this departure may generate greater than average demand because it is the only one scheduled during midday, 100 or more vehicles could be injected into an already congested traffic stream as a result of the ferry. This increase in volume would be accompanied by a concomitant decrease in highway capacity due to the large number of right turns onto the 55-foot alleyway. This situation should create severe congestion problems beyond those which already exist.

At the time of the 5:30 ferry arrival, Front Street traffic approaches or exceeds levels indicative of congestion in both directions. The extent of existing traffic levels severely limits the ability of a substantial number of vehicles, particularly trucks, to execute left turns from the 55-foot alleyway onto Front Street westbound. Most traffic leaving the ferry staging area would consequently have to either make right turns onto Front Street from the alleyway or exit by way of First Street. The former alternative would add to existing congestion problems on Front Street as would the latter since First Street traffic will be competing with Front Street traffic at a nonsignalized intersection. The proposed use of attendants by Mascony to direct traffic across the First-Front intersection would result in traffic stoppages along Front Street. Alternatively there would be serious problems in dispersing the ferry patrons.

It should be pointed out that demand already often exceeds the capacity of Front Street. At such times ferry traffic would have to compete with existing attractions. Therefore, all those seeking to use the ferry or seeking to reach other attractions may not be accommodated by the existing street system, resulting in potentially adverse effects to both due to decreased accessibility.

The 9:45 a.m. arrival and the 7:15 p.m. departure present additional problems. The traffic on Front Street at these hours is heavy. In view of the fact that some vehicles can be expected to arrive early for the 11:15 a.m. and 7:15 p.m. departures, the ferry will be generating both arrival and departure traffic within 1 hour and 1/2 of each other in one case and 1 hour and 45 minutes in the other. At times of peak ferry occupancy, this could have the serious cumulative effect of adding approximately 180 vehicles during these time frames to the already congested downtown area.

It is possible that some portion of the traffic intended for the ferry would enter town by way of County Route 27 to Main Street and move south to Front Street. Access to the ferry landing site would then be by way of right turns onto Front Street and left turns into the alleyway while access to the parking areas would be by way of left turns onto Third Street. The increased number of turns would tend to add to the traffic congestion of westbound Front Street. Another factor to consider is that in times of overdemand (more than 100 vehicles attempting to use the ferry for the same crossing), vehicles approaching the access alleyway to the staging area after this area has reached capacity will stop or slow down, further impeding the flow of traffic.

During the off-season, traffic volumes in downtown Greenport are considerably lower. The above-mentioned adverse impacts of the proposed ferry service on local traffic conditions will, consequently, substantially diminish although concentrated surges of traffic from ferry traffic may cause momentary delays.

Other traffic-related considerations involve the physical condition of the streets themselves. The Village has its own water and sewer systems with installation of sewer pipes on First Street dating back to 1903. The sewer pipes, constructed of vitrified clay with cement joists, are less than 3 feet from the road surface in areas of First Street near Front. There is some concern that heavy truck traffic over the Village's macadam streets, particularly First Street, could result in excess subsurface loads and vibration which may cause the sewer pipes to rupture.[22] Rupture of these pipes would result in the discharge of untreated sanitary sewage into the surrounding area with the possibility of overflow to the street surface. This risk has been reduced to some extent by Mascony's proposal to divert commercial traffic away from First Street when leaving the staging area. Inasmuch as Front Street has a concrete base, the increased traffic is not expected to create any pipe rupture problems with respect to it.

It should be noted that the above discussion is based on the capacities of the involved streets in their present configuration. The Comprehensive Development Plan recommends widening and realigning certain streets in the downtown area and restricting on-street parking on Front Street in order to improve downtown traffic flows. In addition, a traffic study conducted by the Automobile Club of New York at the request of the Village in 1961 recommends institution of a one-way traffic system in the downtown area. An example of how traffic flow could be improved would be to divide Front Street into two 11-foot travel lanes and an 11-foot parking lane which would serve as a turning lane near intersections. In view of Greenport's expressed interest in attracting tourist and vacationer-related activity into the Village, some improvements in downtown traffic flow would appear to be necessary. The Village Planning Board is in the process of preparing a traffic flow study which will be presented to the Village Board of Trustees for approval sometime in 1976. At an informational hearing held recently to assist the planning board in formulating a traffic plan, the business community opposed the institution of one-way traffic flows on the ground that traffic would move too rapidly as a result of such a configuration. Opinion was more favorable to removing parking from Main Street than from Front Street, coupled with the development of off-street parking facilities adjacent to business establishments. To the extent that techniques are employed to increase the capacity of streets in the downtown area, the adverse impacts on traffic congestion associated with the ferry would be mitigated. However, the willingness of the Village to make major changes in traffic configuration at this time is questionable.

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[22] Source: Letter from Holzmacher, McLendon & Murrel, P.C./Consulting Engineers to Mayor of Greenport, dated April 21, 1975.

The institution of the proposed ferry service will have the beneficial impact of easing traffic congestion in the New York City to New London corridor. However, in view of the high daily traffic volumes in this region, particularly in the New York City area, the amount of traffic diverted to the ferry will only have a minor effect on existing conditions.

B. *Energy.*—The proposed service probably will have a beneficial impact on fuel conservation inasmuch as tractor trailers and passenger vehicles using the ferry should save more fuel than Mascony's vessels will utilize in performing the service. Mascony's primary vessel, the *Cape Henlopen*, consumes 120 gallons of diesel fuel per hour at cruising speed. Fuel consumption during idling is approximately 45 gallons per hour. Therefore, each round trip will utilize approximately 405 gallons of fuel (figuring 3 hours cruising time and 1 hour idling during unloading and loading). The *Cape Henlopen's* engines will be shut down when not in use and restarted one-half hour before departure. Under Mascony's plan of operation, the *Cape Henlopen* will be making 626 round trips annually. These trips will consume approximately 253,530 gallons of fuel. Taking into consideration an estimated 182 hours of startup time unrelated to loading, an additional 8,212 gallons of fuel will be consumed. The Greenport, a steampowered vessel, consumes 360 gallons of diesel fuel per hour during cruising and 70 gallons per hour during idling.[23] Based on consumption of 1,150 gallons of fuel per round trip (for 132 round trips a year), the *Greenport* will utilize 151,800 gallons during actual operations. As with the *Cape Henlopen*, the *Greenport's* boilers will shut down overnight or when not otherwise in operation. The boilers would have to be fired 1 1/2 hours before starting to build sufficient pressure. This will result in consumption of an additional 4,600 gallons, making a total of 170,260 for the year. The two vessels combined, therefore, will consume approximately 432,000 gallons of fuel annually, assuming they remain in service. If the backup vessel *Cape May* is put into service to replace the *Greenport*, fuel consumption will remain essentially unchanged. If it replaces the *Cape Henlopen*, however, fuel consumption will increase.[24]

Quantification of the amount of fuel which would be saved by diverting vehicles from the highways to the ferry is difficult. The first problem encountered in making such a calculation is the lack of certainty regarding the origin and destination of potential ferry patrons. The 1972 survey conducted by the Connecticut Department of Transportation demonstrates the dispersion of origin and destination points in the New England region. Although 95 percent of the vehicles boarding the Orient Point ferry at Orient Point in June 1972 originated their trips in New York, only 37 percent of those boarding in New London showed Connecticut origins. Thirty-nine percent of such vehicles originated in Massachusetts, 13 percent in Rhode Island, and approximately 9 percent from other points outside New York. The destinations of those disembarking in New London were similarly dispersed, with 36 percent of the traffic destined to points in Massachusetts, 31 percent moving to points in Connecticut, 12 percent bound for Rhode Island, and 15 percent destined to points in other States. On the other hand, 93 percent of the vehicles boarding in New London had destinations in New York.

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[23] Although testimony adduced at the hearing indicated that the *Greenport* consumed 120 gallons per idling hour, this figure was based on firing both generators during idling instead of one as Mascony has proposed.

[24] Mascony proposes to convert its steampowered vessels, the *Greenport* and *Cape May*, to diesel should the application be granted. This would result in a general reduction in fuel consumption and, consequently, an increase in the magnitude of beneficial energy impacts.

Another factor complicating the quantification of vehicle fuel consumption in the absence of the ferry is the sporadic nature of ferry-riding habits. Unlike a commuter train or bus service, the bulk of the involved ferry trips are expected to be for social or recreational purposes with the vast majority of customers riding the ferry less frequently than once a month. Regular ridership patterns will, therefore, be extremely difficult to ascertain.

Even if 200 miles, the highway distance between Greenport and New London, is arbitrarily assumed to be the length of the average trip for potential ferry users, actual fuel savings resulting from riding the ferry still cannot be calculated with any assurance. If there was no existing ferry service across the Sound and all potential Mascony users would otherwise have made the trip over the highways, it is obvious that substantial fuel savings would result from the availability of the ferry. Taking Mascony's projection of 66,385 spaces sold annually (which, based on an estimated ratio of 19 car spaces to 1 truck space, would amount to 63,066 automobiles and 3,319 commercial vehicles) annual fuel consumption without the ferry service would be approximately 1.03 million gallons.[25] Therefore, the total fuel conserved by diverting Mascony's projected vehicle traffic from the highways would be approximately 600,000 gallons annually. However, actual conditions impair the utility of this figure. In actuality, Mascony will attract many vehicles that would otherwise have utilized existing ferry service, as well as other vehicles which may not have made the trip at all under existing conditions. To the extent that traffic is diverted from the Orient Point ferry to Mascony, fuel savings will be very minimal, with vehicles originating or destined to western Long Island or the New York City area saving only the amount of fuel needed to travel the 8 miles between Greenport and Orient Point. Furthermore, the ferry may create a demand for itself, attracting passengers who may not have even made the trip without the services of an additional ferry available. To this extent, institution of the proposed service may stimulate vehicle trips and the resultant fuel consumption. On the other hand, the availability of the ferry may encourage potential travelers to leave their automobiles behind and ride the ferry as passengers. Thus, although the proposed service is likely to have a beneficial impact on energy consumption, it cannot be conclusively deemed significant, particularly in view of the total fuel consumed in the New York/New England area annually.[26]

C. *Air quality.*—In view of the lack of heavy industry and predominantly agricultural land use, air quality for the town of Southold is excellent.[27] Suspended particulate and sulfur levels are low, the only potential problem being with settlable particulates such as blowing sand. While the inauguration of the proposed ferry service would lead to an increase in carbon monoxide, sulfur dioxide, hydrocarbons, and nitrogen oxide levels in Greenport and its vicinity due to the rise in vehicular traffic, the impact on ambient air quality in the Village is not expected to be significant.

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[25] This figure is based on Environmental Protection Agency average fuel consumption figures of 14 miles per gallon for passenger automobiles and 5 miles per gallon for commercial vehicles.

[26] Over 6.2 billion gallons of motor fuel were consumed for highway purposes in New York State in 1973. In Massachusetts, Connecticut, and Rhode Island, the three New England States from which ferry traffic is most likely to be drawn, total highway motor fuel consumption exceeded 4.2 billion gallons in 1973. Source: United States Department of Transportation, Federal Highway Administration, *Highway Statistics*, 1973. The projected fuel savings attributable to the ferry, even if the liberal figure of 600,000 gallons is assumed, would represent less than one-hundredth of one percent of this total.

[27] Source: New York State Department of Environmental Conservation, Air Resources Division.

In New London, levels of particulates, sulfur oxides, carbon monoxide, and nitrogen oxides are all less than national standards. There is a problem in Connecticut with photochemical oxidants, however, attributable largely to hydrocarbons which are emitted by automobiles. The standard of 108 parts per million (ppm) was exceeded during 30 percent of the days between May and September 1975 inclusive, reaching maximums of as much as 25 ppm in nearby Groton.[28] High hydrocarbon levels are dependent largely on the number of vehicle miles traveled in the State and are primarily an areawide rather than local problem due to the broad dispersion of hydrocarbons throughout the ozone layer. Therefore, by reducing the number of vehicle miles traveled on State highways the ferry would have a slight beneficial impact on photochemical oxidant levels. To the extent the ferry generates traffic which would not otherwise be using the highways, it will contribute to the problem. However, concentration of vehicular traffic in Mascony's proposed staging areas could result in carbon monoxide emissions which exceed the national 1-hour standard of 0.040 g/m^3. At Greenport, automobiles and trucks will be staged in an area of approximately 8,100 square feet. During the summer, the period of peak demand for ferry service, the average wind in Greenport comes from the west at about 10 mph and the average temperature is 75° F. At stability class E, which assumes a worst-case situation, concentrations of CO would exceed national 1-hour standards under certain conditions, depending primarily upon the number of vehicles running their motors simultaneously over the course of an hour. (See table 3.) Thus, in almost all instances will standards be exceeded in the immediate vicinity of this area. However, the further the distance from the source the less frequently the standard is violated. Concomitantly, the greater the number of cars in operation at a single time, the greater the possibility that the standard will be exceeded. It is not known how many cars would be running at the same time in the staging area after unloading or while waiting to board. However, if Mascony is able to keep the number under 20 through the use of signs and/or attendants, the impact upon air quality, while adverse, should not be significant. Even at those times when the standard is exceeded, the impact will be of short intermittent duration, affecting only a small area within the village. Emission impacts in the New London Bank and Sparyard staging area, based on similar wind speeds and temperatures at stability class D, would not be significantly different (see table 4). Increased traffic on Front Street should not result in violation of the 1-hour standard. Assuming that 30 cars move continuously on Front Street between Third and First for 1 hour at 5 mph, the 1-hour concentration of carbon monoxide at Front and First would be 0.017 g/m^3, considerably below the 1-hour standard of 0.040 g/m^3. In view of the anticipated lighter congestion at New London, 1-hour concentrations there should be even lower.

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[28] Source: Connecticut Department of Environmental Protection, Air Compliance Unit.

TABLE 5

Emission factors for inboard vessels emission factor rating: D

Pollutant	Steamships[a]				Motorships[b]			
	Underway		In-berth		Underway		In-berth	
	lb/mi	kg/km	lb/day	kg/day	lb/mi	kg/km	lb/day	kg/day
Particulate	0.4	0.098	15	6.8	2	0.49	16.6	7.5
Sulfur dioxide[c]	7S	1.71S	300S	136S	(SO_x) 1.5	0.37	43	19.5
Sulfur trioxide[c]	0.1S	0.02S	4S	1.8S				
Carbon monoxide	0.002	0.0005	0.08	0.036	1.2	0.29	46	20.8
Hydrocarbons	0.2	0.05	9	4.1	0.9	0.22	33	14.9
Nitrogen oxides (NO_2)	4.6	1.13	200	90.7	1.4	0.34	50	22.7
Aldehydes (HCHO)	0.04	0.01	2	0.9	0.07	0.017	2.6	1.2

[a] Based on fuel consumption data and emission factors for fuel oil.

[b] Based on fuel consumption data and emission factors for diesel fuel.

[c] S—weight percent sulfur in fuel; assumed to be 0.5 percent for diesel.

Source: Environmental Protection Agency, "Compilation of Air Pollutant Emission Factors," April 1973.

TABLE 3

Estimated carbon monoxide emissions at proposed Greenport staging area (national 1-hour standard - .040 g/m³)

N	A		B		C	
	5 mph	Idle	5 mph	Idle	5 mph	Idle
10	[1].036	.053	.020	.029	.013	.019
20	.071	.105	.039	.057	.025	.037
30	.107	.158	.059	.086	.038	.057
40	.142	.210	.077	.114	.049	.073

[1] Estimated emissions of CO in g/m³.
N—Number of cars in operation simultaneously.
A—Observer at 0 feet.
B—Observer at 45 feet (east).
C—Observer at 90 feet (east).

TABLE 4

Estimated carbon monoxide emissions at proposed permanent New London staging area (national 1-hour standard - .040 g/m³)

N	A		B		C	
	5 mph	Idle	5 mph	Idle	5 mph	Idle
10	[1].032	.048	.015	.023	.010	.015
20	.065	.096	.031	.046	.020	.029
30	.097	.144	.046	.069	.030	.044
40	.129	.191	.061	.091	.039	.058

[1] Estimated emissions of CO in g/m³.
N—Number of cars in operation simultaneously.
A—Observer at 0 feet.
B—Observer at 45 feet (east).
C—Observer at 90 feet (east).

Emissions from the ferry engines should not present a problem. Emission factors for oil-burning steam and diesel electric engines for inboard vessels are presented in table 5. In view of the limited number of ferry trips per day, the impact on air quality both over the Sound and in the involved ports will not be significant. Ferry emissions while crossing the Sound should be easily dispersed.

Finally, by providing a water route between New England and Long Island, the ferry will eliminate the need for many vehicles to traverse the congested New York City area in order to reach their ultimate destinations. While this will be beneficial to air quality in the region, the quantitative impact will be extremely minimal in view of the high existing levels of pollutants and the minute percentage of total area traffic which stands to be diverted.

D. *Water quality.*—The water quality in New London Harbor, including the Shaw's Cove area, has been classified as "SC" by the Connecticut Department of Environmental Protection with the intent to eventually reach "SB" status.[28] The water quality around Greenport is generally good, although the harbor is closed to shellfishing.

The main threats which the ferry will pose to water quality involve possible discharges of sanitary wastes, oil, litter, bilge, and wash water, and the possibility of thermal pollution.

Mascony will install holding tanks in its vessels and pump the waste discharge either into its own self-contained tanks equipped with a filter system or directly into the municipal sewer system at New London. After the waste passes through Mascony's tanks it would only be pumped back into the New London harbor if the discharge was of a quality capable of meeting applicable State and Federal standards. Otherwise, the discharge will be pumped into the sewer system. Mascony will use fresh water as a flushing medium and plans to utilize approximately 3 gallons per passenger. The largest strain on the New London Sewage Treatment Plant will be during the summer peak when Mascony anticipates attracting 150,000 passengers, one-half of its total annual volume. At this time the discharge into the New London sewer system would be approximately 1,700 gallons per round trip or 6,800 gallons each day. The New London Sewage Treatment Plant has a design capacity of between 3 and 3.5 million gallons per day. However, average flows now exceed capacity during times of peak ferry service, ranging between 3.63 million gallons per day in August and 4.48 million gallons daily in May. Despite the fact the plant's design capacity is regularly exceeded, the only danger of overflow occurs in the spring, a period during which Mascony's contribution to the daily flow would be much less than the peak average of 6,800 gallons per day. The New London Sewer Authority indicates that the increase in flow attributable to Mascony's operations, even during peak periods, would be nominal.

As with sanitary wastes, the litter problem will be a function of ridership and thus is expected to be most serious in the summer. Inasmuch as the snack bars on Mascony's vessels will be indoors and are equipped with sitdown eating facilities, litter in the Sound and harbors should not be significant.

Under the Federal Water Pollution Act and the Water Quality Improvement Act it is illegal to discharge oil from any vessel into or upon the navigable waters of the United States. Federal pollution control regulations require a holding tank with sufficient capacity to contain fuel wastes and a piping system to pump such wastes to a shoreside facility or discharge point. Mascony's holding tanks will be of sufficient capacity to contain such wastes and a pumping system will be put into operation.

Accidental oil spills are a possibility with any ferry operation. Inasmuch as Mascony is applying for an initial operating certificate, there is no indication of how effective its spillage control procedures will be. However, if it is assumed that Mascony will use ordinarily prudent care in avoiding fuel spillages, the threat to water quality should be minimal. There should be no thermal pollution problems with Mascony's steampowered vessels since their engines would be water-cooled and surrounding water temperatures would not be significantly raised.

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[28] Class "SC," which is one level above unacceptable, is described as suitable for fish, shellfish, and wildlife habitat; suitable for recreational boating and industrial cooling and of good aesthetic value. Class "SB" is suitable for bathing, other recreational purposes, industrial cooling, and shellfish harvesting for human consumption after depuration. It is also an excellent fish and wildlife habitat and of good aesthetic value.

Although there may be temporary increases in turbidity due to installation of dolphins and bulkheads and backfilling in Mascony's ferry slips, the impact will be only minor and short term. It should be noted, however, that steel sheet pilings may alter the movement of ground water, thereby modifying adjacent water tables. The Connecticut Department of Environmental Protection has certified that Mascony's proposed New London improvements (as originally set forth was dolphins extending into the secondary channel) will not permanently violate Connecticut's water quality standards. Mascony's revised plan should have a similar nonadverse impact. The New York State Department of Environmental Conservation has issued Mascony a Tidal Wetlands Permit, Steam Protection Permit, and Water Quality Certification based on its revised operating proposal in Greenport. It was found in the department's report granting the above permits and certification that the underwater lands to be disturbed by pile driving operations for dolphin installation will be entirely beneath tidal waters and that no wetland vegetation or marsh areas will be endangered. Roiling of the water during installation will only be temporary and in the immediate vicinity of the dolphins. The State Department of Environmental Conservation has further concluded that the Greenport project will not cause unnecessary damage to the State's waters.

E. *Historic.*—There are numerous historic sites in New London listed in the National Register of Historic Places (see table 6). Of these sites, only the customhouse and the railroad station are located in the immediate area of Mascony's two proposed ferry landing sites. The railroad station, located at the foot of the State Street directly opposite the municipal pier, was constructed in 1887 and has been attributed to the noted American architect Henry Hobson Richardson.[30] Present plans call for the Romanesque Revival structure to be converted into commercial space and a restaurant with Amtrak continuing to utilize space for passenger operations. Use of the municipal pier for the proposed service will not block access to the station, there being sufficient space to stage and store vehicular traffic, and existing streets should adequately handle the extra volume. The inclusion of the Mascony ferry in the multimodal transportation terminal planned for the New London waterfront will enhance tourist access to this historic site as will the planned rejuvenation of the waterfront in general. In conjunction with these plans, certain renovations to the station building and the immediate area are already being undertaken. The customhouse, constructed in 1833 by the notable architect Robert Mills, is located in the Shaw's Cove area on Bank Street. Renovation of the area will show this site off to better advantage as blighted buildings are torn down or rehabilitated and Bank Street is widened. Institution of the proposed service will increase tourist access to the site from the water. Although Bank Street will become more congested until it is widened, the thoroughfare should be sufficient to permit adequate access to the customhouse by automobile.

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[30] Source: United States Department of Interior, National Park Service, "Historic Railroad Stations" (1974).

TABLE 6

New London historic sites

Site	Location
Nathaniel Hempstead House (Old Huguenot House)	Corner of Jay, Hempstead, Colt, and Truman Street
Deshon-Allyn House	613 Williams Street
Joshua Hempstead House	11 Hempstead Street
Monte Cristo Cottage (Eugene O'Neill House)	325 Pequot Avenue
New London County Courthouse (State Courthouse)	70 Huntington Street
New London Customhouse	150 Bank Street
New London Public Library	63 Huntington Street
Shaw Mansion	11 Blinman Street
Whale Oil Row	105-119 Huntington Street
Fort Trumball	Fort Neck
New London Railroad Station	Foot of State Street
Thames Shipyard	West bank of Thames River, north of Coast Guard Academy
Williams Memorial Building Institution[1]	110 Broad Street

[1] Eligible site.

Source: National Register of Historic Places.

The Connecticut State Historic Preservation Office indicates that Bank Street itself may be eligible for inclusion in the National Register of Historic Places. The De Noia Bros. Furniture Store (otherwise known as Bassett House), a three-story stone residence of the federal style built in 1836, is listed on the Connecticut Statewide Inventory of Historic Resources. This building, located on Bank Street, stands on the property which Mascony proposes to use as its permanent staging area. The City Redevelopment Agency has indicated its desire to maintain and rehabilitate this structure and Mascony proposes to restore it and utilize it as a combination ticket office and waiting station for ferry patrons. Applicant does not contemplate demolishing any other building on Bank Street. The instant proposal, therefore, would have no adverse effect on historic resources in New London.

There are no sites in the National Register of Historic Places listed for Greenport or its environs. However, the Greenport Nature Study Area, located north of NYS 25 and west of the downtown area, has been recommended as a potential natural landmark under the National Landmarks Program administered by the National Park Service of the U.S. Department of Interior. The study area is described as an exceptionally fine example of a mature upland hardward forest and the only known area where the Crane Fly Orchid can be found. Marbled, tiger, and spotted salamanders, all of which are endangered in Long Island, also inhabit the study area.[31] The only potential impact which the ferry might have on this area would be the facilitation of exposure of the area to a greater number of people. The danger from overuse of the area by the masses should be slight, however, since a large percentage of ferry patrons are expected to spend only a minimal amount of time in the Village.

F. *Safety.*—Potential safety problems with the proposed action exist both on land and in the water. The proposed ferry landing at Bank and Sparyard Streets in New

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[31] Source: Smithsonian Institution, "Survey of Natural Areas of the Atlantic Coastal Plain—Ecological Themes" (1974).

London necessitates access over the ConRail main line tracks by means of a private grade crossing which is currently not protected by any fail-safe signal. Twenty-six scheduled passenger trains and four freight trains move over the track daily. Although westbound trains have an unobstructed view of the crossing 1,200 feet before they approach it, the crossing is located 120 feet from the end of a sharp curve for eastbound trains whose view of the crossing is obstructed by an old warehouse building located on the dock side of the tracks. The authorized maximum speed for trains moving over the crossing is 25 miles per hour.

In conjunction with Mascony's application to change the use of, widen, and install an automatic protection device over the crossing, a hearing was held on this matter before the Connecticut Public Utilities Commission (PUC) on May 30, 1975. However, the PUC did not resolve the safety issue and dismissed the application without prejudice in light of the denial of applications by this Commission and the State Department of Environmental Protection.

In view of the frequency of train arrivals at the New London station, scheduling around them, particularly during the summer peak, would be difficult. Potential dangers can be mitigated, however, by installation of fail-safe crossing signals and the strategic stationing of attendants along the tracks to keep the tracks clear.

The view from the tracks approaching the station adjacent to the municipal pier is relatively unobstructed and a fail-safe protection device is already in place at the public grade crossing. Mascony also plans to station attendants at the crossing.

The increase in traffic congestion in Greenport, particularly the increase in the number of left turns being made by traffic exiting the ferry onto Front Street, is likely to result in an increase in automobile accidents in an area which is already the most accident-prone part of the village. The possibility of accidents would also increase at the potentially dangerous intersection of Webb, First, and Main Streets. Furthermore, stoppage of traffic on Front Street may block access to the Shelter Island ferry by way of Third Street for ambulances needed on Shelter Island. Shelter Island lacks hospital facilities and must depend on ambulances being ferried over from Greenport to answer emergency calls. However, alternate means of access to the Shelter Island ferry would still be available through Wiggins and Fourth, Fifth, or Sixth Streets.

Another safety issue of potential importance is the ability of Mascony's vessels to navigate in Greenport Harbor without endangering fishing or pleasure craft. Small craft activity in the harbor is high during the summer months and collisions between such boats and Mascony's vessels are possible. However, if reasonable care is taken to observe the navigational "rules of the road," the danger to fishing or pleasure craft should not be serious.[32]

G. *Socioeconomics.*—The Greenport Planning Board alleges that the increased vehicular traffic generated by the institution of Mascony's service will have an adverse impact on the Village's development insofar as increased congestion in the downtown area may discourage regular seasonal tourists or inhabitants of nearby villages from visiting Greenport to vacation or shop. The board further contends that ferry users will view the Village merely as a ferry terminal and will quickly pass through town on the way to their ultimate destinations. While it is true that many ferry patrons will view Greenport in this way, it is also likely that many others will probably take the time to patronize Village retail establishments before boarding or after disembarking. The enhanced accessibility of downtown Greenport to New England tourists may well have a stimulating impact on the town's economy, although it is also possible that the presence of the ferry in Greenport Harbor may discourage fishing and pleasure boating activity during ferry arrivals and departures. Concomitantly, tourism in New England and eastern Long Island in general should be stimulated by an additional ferry link between the two regions.

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[32] United States Coast Guard, Marine Safety Division.

The inauguration of an additional ferry service may also be beneficial to Long Island potato growers by expanding their markets into New England. By decreasing transit times and reducing fuel costs, the ferry will allow goods to be transported more efficiently and tend to promote commerce between New England and Long Island.

The presence of the ferry in New London would assist that city's effort to rehabilitate its waterfront. Since most of the land in New London is already developed, economic growth in the city will depend largely upon more intensive development of this land. Renewed commercial use and development of waterfront property such as that proposed by Mascony would have a beneficial impact on economic growth within New London.

Institution of the proposed service will also result in a small increase in employment inasmuch as Mascony will employ between 12 and 26 crewmen during the course of each year. It should be noted that this impact will be minimized in the event increased competition forces Cross-Sound to cut back or discontinue its Orient Point service.

H. *Aesthetics.*—The Village of Greenport projects a charming, fishing village ambiance with its narrow streets, pleasure and fishing boat marinas, and large old houses. The increase in passenger and commercial vehicles generated by the Mascony ferry and its attendant congestion will tend to diminish appreciation of these aesthetically pleasing qualities in the downtown area. Furthermore, Mascony's large vessels will be incongruous with the aesthetics of the waterfront itself.

The aesthetic impact on New London, on the other hand, will be minimal. The harbor area houses several other commercial ferry vessels in the general vicinity and the aesthetics of the area are poor. To the extent that granting the application results in the demolition of unsightly commercial buildings in the Shaw's Cove area, there will be a slight beneficial effect on the area's aesthetic values.

I. *Noise.*—The increase in vehicular traffic generated by the ferry will result in a rise in ambient noise levels in New London and Greenport during the periods surrounding ferry arrivals and departures. Noise levels resulting from more than one source at a point are obtained by adding logarithmically. For example, while one source may emit a noise level of 50 decibels, two sources of this magnitude would produce a combined noise level of 53 decibels and three sources would result in a noise measurement of about 54.8 decibels. Therefore, the more sources that are introduced, the lower the incremental contribution will be from any new source.[33] Consequently, a very significant noise intrusion would be required to substantially change current ambient levels. However, the increase in traffic congestion in downtown Greenport may result in the spreading of downtown noise levels to areas further west on Front Street. Concomitantly, diversion of traffic from the highways between New York City and New England will result in immeasurable reductions of ambient noise levels in this corridor.

Insignificant noise intrusions will result from the sound of the ferry's engine and its whistle (if blown) as well as from the short-term pile driving of dolphins.

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[33] It should be noted, however, that loudness increases exponentially as decibels increase arithmetically. Sixty decibels may, therefore, be twice as loud as 50. However, at current levels of traffic in downtown Greenport, the additional noise generated by ferry traffic will not be significant.

J. *Wildlife.*—The proposed operation will have no impact on the shellfish, primarily scallops and oysters, which are found in the waters off Greenport. The area encompassing the Harbor is closed to shellfishing in view of the existing sources of bacteria already present while the water beyond the harbor area is so deep that the shellfish beds on the botton will not be disturbed by vessels with the size draft possessed by Mascony's ferries.[34]

The northeast corner of Mascony's Bank and Sparyard Street piers contains an exposed mud flat that gradually slopes to a depth of about 8.5 feet. In the slope, a healthy stand of eel grass was found during field inspections conducted by the Connecticut Department of Environmental Protection in July 1973, and May 1974. Sea lettuce, rockweed, and blue green algae was also prevalent on rocks and an abundance of barnacles was attached to the old pilings, rocks, and pier structure. Invertebrates, including polychaetes, nereids, scale worms, amphipods, green crabs, and possibly oligochaetes, are present along various portions of the pier. Fourteen varieties of fin fish, including bluefish, winter flounder, and smelt, have also been identified as utilizing the area around the pier. Restoration of the existing bulkhead would provide a habitat to a wider variety and number of marine organisms.[35] It should be noted that analysis of water quality and marine life impacts resulting from restoration and installation activities in both Greenport and New London should be presented in greater detail in environmental studies to be conducted by the Corps of Engineers as a prerequisite for action on Mascony's application for Corps permits.

IV. *Alternatives to the proposed action*

In accordance with the full disclosure aspects of NEPA, reasonable alternatives to the proposal will be presented below even though in some instances Commission jurisdiction may be limited. It should be noted at the outset that section 309(d) of the Interstate Commerce Act prohibits the Commission from restricting the right of a water carrier to add to its equipment, facilitities, or service within the scope of a certificate, as the development of the business and the demands of the public shall require.

A. *No action.*—The no-action alternative, which entails denial of the application, would serve to maintain the status quo. Automobiles and trucks seeking to travel between New England and Long Island would either have to utilize existing ferry services or, to the extent such service is incapable of meeting demand, utilize more circuitous highway routes. Consequently, fuel may be utilized less efficiently if trips which could partially be made by ferry are made entirely over the highways. Travel between the two areas may also be less convenient and social and pleasure trips may, consequently, be less frequent than if the ferry was available.

Denial of the application would also result in the maintenance of existing Greenport traffic patterns by precluding the introduction of a large influx of ferry-related traffic. The Village's progress as a tourist attraction would neither be hindered by clogged streets nor helped by the large number of ferry travelers which would enter town. Greenport would be more free to develop its waterfront along the lines of its Comprehensive Development Plan.

Inaction would have only a minimal impact on New London, which is already served by existing ferry service. While an additional service would be consistent with the city's development plan, the plan is not dependent on a grant of the Mascony proposal.

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[34] Source: New York State Department of Environmental Conservation, Region 1, Water Quality Unit.

[35] Source: Connecticut Department of Environmental Protection.

Finally, a denial of the application would preclude potential safety hazards in New London and Greenport Harbor. While potential adverse impacts on air and water quality in the affected areas will be avoided, these impacts would not have been significant with the ferry in operation.

B. *Alternative sites.*—1. *Greenport.* The primary alternative site for the proposed service in Greenport would be the area south of the Long Island Railroad tracks. Staging would have to be accomplished south of the tracks if this site were to be used because the area north of the tracks is leased for a term of 20 years to Suffolk County and subleased to the Village which uses it to store cars for the Shelter Island ferry. The land was made available for such purpose at no charge to the Shelter Island ferry in order to avoid the necessity of staging vehicles on Wiggins Street. The Shelter Island ferry also hold a 15-year lease over a 4,000-square-foot parcel directly north of the railroad station and adjacent to its landing site.

This site would be preferable from an environmental standpoint since it would divert traffic fron the congested downtown area. Eastbound vehicles destined for the staging area could turn off Front Street at Fourth Street and cross over the railroad tracks at grade into the staging area. Safety problems would be minimal in view of the infrequency of existing rail passenger service into Greenport. The railroad site would also alleviate potential safety problems in the harbor by shifting the landing site away from the numerous marinas adjacent to Mascony's presently proposed site. Existing Mascony properties could still be utilized for parking and staging purposes, although use of the railroad property for staging purposes would be preferable in order to avoid congestion on Third Street. The railroad is willing to discuss leasing this property to Mascony provided its right to future use of the property is protected and Village and county officials are amenable to ironing out potential problems.[36] Use of the railroad site would have the disadvantage of requiring some dredging in the harbor and using a residential street, Fourth Street, for access.

Other potential sites may be available for ferry use in the northeastern part of the Village. The feasibility of these sites has not been given serious consideration in view of the fact that Mascony has invested substantial sums of capital in property south of Front Street. If property for a parking, staging, and docking area could be made available in this area, ferry-related congestion on Front Street would be relieved since vehicles could utilize County Road 27 and Main Street to gain access to the ferry without entering the downtown area. However, in view of the fact that residential streets unaccustomed to handling tourist-related traffic will have to be utilized for ferry access, some disruption of residential enjoyment of the area may result.

While the Commission lacks the necessary authority to require Mascony to utilize one of the above-identified alternatives instead of its proposed site, use of any site is contingent upon approval of a Site Development Plan by the Village pursuant to Article IX of the Greenport Building Zone Ordinance.

The Tri-State Regional Planning Commission, in a study issued in December 1975,[37] considered nine potential pairs of termini for a tentative State-run cross-sound ferry operation. Greenport and New London were one of the pairs considered, with the studied site in Greenport being located on the eastern shore of the village. The study concluded that the overall feasibility of running a ferry service between New London and Greenport was poor, based primarily on the economic costs and poor highway access. It should be noted, however, that such projections were based on substantially higher volumes (between 200,000 to 2 million vehicles annually) than those projected by applicant. The study rated the impact and feasibility of site access and terminal location and construction as good.

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[36] Source: Letter from Walter L. Schlager, Jr., President, Long Island Railroad, dated March 1, 1976.

[37] "Crossing the Sound: A Study of Improved Ferry Service on Long Island Sound."

2. *Other points on Long Island.*—In the event the application is denied due to operational problems in Greenport and other sites in Greenport are not feasible, Mascony could consider filing a new application seeking authority from another location in Long Island.

Mascony has already investigated alternative locations and presented an operating proposal to the village of Sag Harbor during the summer of 1975. Sag Harbor is located on the north shore of the South Fork of Long Island, on the southern shore of Gardiner's Bay (see figure 1). Use of Mascony's proposed Sag Harbor site would involve problems similar to what it now faces in Greenport. The docking site would be located directly north of the business direct which is characterized by quaint, narrow streets as in Greenport. Inasmuch as Sag Harbor is also a popular summer resort village, traffic problems are likely to arise during the summer months. An additional problem would be created in view of the fact that the entire Sag Harbor Village District is listed as an historic site in the National Register of Historic Places. The potential impact of ferry traffic on village streets may adversely affect the village to the degree that a Sag Harbor proposal could require preparation of a statement under §106 of the National Historic Preservation Act. A Mascony spokesman has informed the Environmental Staff that it would not file an application seeking authority from Sag Harbor unless it received support from the village. Testimony at public meetings regarding the proposal showed a mixed reaction among the townspeople, although some vehement opposition was expressed, and an organized antiferry group in Sag Harbor has started efforts aimed at mobilizing opinion against the ferry should an application be filed.

In addition to New London and Greenport, the Tri-State Regional Planning Commission study cited above evaluated the following sites as potential ferry termini for a cross-sound service (the Connecticut termini are listed first in all cases): (1) Stamford-Lloyd Point, (2) Sunken Meadow-Sherwood Point, (3) (a) Bridgeport (current site)-Port Jefferson, (3) (b) Bridgeport (Fayerweather Island)-Port Jefferson, (4) New Haven-Wading River, (5) Guilford-Centreville, (6) Westbrook-Hashamock Beach, (7) Saybrook Point-East Marion, and (8) New London-Orient Point. Each pair was analyzed with respect to economic viability and the impact and feasibility of highway access, site access and terminal location and construction. Based on 100-vehicle vessels carrying a projected 500,000 vehicles per year, it was concluded that major services would be feasible only at sites (3)(a), (4), (5), and (8) with Bridgeport-Port Jefferson and New London-Orient Point being the most attractive alternatives. Despite this conclusion, the report stated that problems could be anticipated with respect to improving highway access at Port Jefferson, terminal construction and site access at Wading River, highway access at Guilford, and terminal construction at Centreville and Guilford. Except for Orient Point, none of these Long Island sites is feasible in conjunction with Mascony's New London terminal. The Saybrook Point-East Marion location was rejected primarily because of problems associated with the Connecticut site. East Marion is located between Greenport and Orient Point and may present a feasible alternative to locating at Greenport inasmuch as it is accessible to Mascony's New London terminal. However, use of the East Marion site studied in the Tri-State report would entail construction of a 400-foot-long causeway in order for vessel depths to be adequately accommodated.

C. *Operational changes.*—In lieu of changing sites, Mascony might be able to alleviate adverse impacts by making changes in its operating proposal. It might, for example, rearrange its schedule to avoid adding to traffic in the Front Street area during peak daily periods or it could stay out of Greenport during the peak season entirely.[38] While such steps would clearly mitigate adverse impacts associated with its existing proposed schedule, it is doubtful that such an operating plan would adequately serve the public during periods of greatest demand. Furthermore, it is questionable whether Mascony could maintain a viable operation without revenues from these periods of high demand.

Traffic congestion on Front Street could be alleviated to some extent if Mascony was able to obtain a right-of-way over the property of East End Supply (see figure 4). Ferry-related traffic could either exit or enter the staging area through Third Street without competing with Front Street traffic between Third and Main, the area where traffic levels are highest. As table 1 indicates, hourly volumes on Third Street are much lower than those on Front in spite of the fact that it is 17 feet wider. Traffic moving onto and off Front Street by way of Third would be competing with Front Street traffic at a signalized intersection. Traffic flow, therefore, would be smoother and safety hazards would be reduced. However, East End Supply is unwilling to make a right-of-way over its property available to Mascony.

V. *Adverse environmental effects which cannot be avoided*

Barring significant changes in Greenport's street alignments or traffic flow configurations, traffic generated by the proposed action will increase congestion on Front Street in Greenport which already frequently reaches its capacity during the summer months. Less severe traffic congestion may also occur in New London during peak periods.

This increase in vehicular traffic concentration within a relatively small area of Greenport will enhance the potential for accidents, as will the movement of vehicles across railroad tracks in New London. The potential for boat collisions within Greenport Harbor will also be increased. While there may be adverse impacts on air pollution in Greenport and New London, these impacts will be of short duration and concentrated in small areas and, to a small extent, will be counterbalanced by improvements in the environment between New London and New York City. Mascony's vessels will consume an estimated 432,000 gallons of fuel per year. Automobile and truck fuel savings attributable to utilization of the ferry should, however, result in less overall fuel consumption. Impacts on noise and water pollution should not be serious.

VI. *The relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity*

The introduction of an additional ferry service linking New England and eastern Long Island is likely to have a beneficial impact on productivity. Producers in both areas will be able to expand their markets or market their goods more efficiently as a result of the fuel and travel time conserved by utilizing the ferry.

The potential increase in the number of recreational trips between the two regions stimulated by the proposed ferry would benefit areawide economies. The local economic impact on Greenport, however, is uncertain in view of the possibility that the injection of ferry travelers into the village could have both positive and adverse effects on its attractiveness to tourists and boaters.

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[38] It should be noted that the Commission lacks authority to require such changes.

VII. *Any irreversible and irretrievable commitments of resources which would be involved should the proposed action be implemented*

A grant of the application would result in removal of Mascony-dedicated property in Greenport from use for off-street parking or pedestrian walkways as recommended in the Village Comprehensive Development Plan. Use of Mascony's New London properties for other potential commercial or recreational purposes will also be precluded.

No. W-1270

APPENDIX

Applicant's public witnesses

Name	Location	Used	Frequency	Reason	Comments
1. Marriett Campbell	Framingham, Mass	Yes	Every other month	Pleasure	Not able to get car on ferry, but went as a walk-on passenger. Mainly used on Friday nights July 1972 through July 1973.
2. Joseph E. Moukawsher	Groton, Conn	do	Once 5 years ago	do	Unable to take car on ferry. Car brought over the next day.
3. James Davis	Waterford, Conn	--------	--------	--------	Representative of United Brotherhood of Carpenters and Joiners of America. It supports the application to spur the building industry.
4. Daniel S. Kattiner	Bridgehampton, N.Y	Yes	Last used in fall of 1969.	Business	Was dissatisfied with the service and has not used it since.
5. Marilyn Bokee	Mattapan, Mass	do	Once a month	Pleasure	No problem as a passenger. Two- to 3-hour wait if car is taken. Boats are clean.
6. Constance Conti	East Providence, R.I	do	Frequently	do	Two- to 3-hour wait with a car, no problem if without one. Traveling usually in summertime.
7. C. Francis Driscoll.	New London, Conn	--------	--------	--------	Testified concerning the protective devices for the railroad grade crossing adjacent to applicant's proposed docking facility in New London.
8. Pat DeNola	Groton, Conn	Yes	Frequently	Pleasure	Long delays in boarding. As much as 4 hours. The boats have insufficient seating.
9. Nicholas Wavlotis	New London, Conn	--------	--------	--------	Operates a restaurant across from protestant's terminal, states in summer there are long lines of cars waiting for service and many others leave without waiting.
10. Donald B. Sweet	Groton, Conn	Yes	Two trips during July 19[illegible].	--------	Had to wait for the boat once, did not enjoy the trips.
11. John DeLaura	do	No	--------	--------	Believes proposal would benefit the economy.
12. Mark Snider	Chesnut Hill, Mass	Yes	Twice a year in July and August.	Pleasure	Did not find the employees courteous and the boat was old and dirty.
13. Charles E. Webb	Orient, N.Y	do	One-12 times a year in spring, summer, and fall.	Personal	Had to frequently wait 2 hours for a boat. Would not be satisfied with service every 4 hours.
14. John B. Tuttle	do	do	Two or three times a year.	--------	Observed long lines waiting to board. The property in Orient is not kept clean from paper and cans.
15. Joe DeNobrega	Groton, Conn	do	As many as six times a year prior to 1973.	Business and pleasure.	Long waits, as much as 1-5 hours
16. Nicholas Palmerone.	do	do	In the past used it once or twice a month.	Business and pleasure.	Was unable to board on three occasions in July on Sundays.
17. Dean Zanni	Old Saybrook, Conn	--------	--------	--------	Served on protestant's vessels between 1960-68 and on occasion saw vehicles left behind during this time.
18. Father Ivan Ferguson.	Tariffville, Conn	Yes	Frequently during summer and holidays.	Pleasure	Has ceased to use the ferry because of the long delays (2 hours).

No. W-1270
Appendix

Applicant's public witnesses—Continued

Name	Location	Used	Frequency	Reason	Comments
19. Frank Arbour	Groton, Conn	Yes	Once in 1973 and once in 1971.	Business and pleasure.	Vessel left late in 1973 and could not board in 1971 on the day desired.
20. Gloria Shafter	New London, Conn				Works at a motel as a desk clerk and stated people come in who are unable to take the ferry as they had planned.
21. Melvin Jetmore	Niantic, Conn				Lived in New London and observed lines of cars waiting to board. Believes additional competition would be good for service and New London.
22. Augustino Delfarno.	Lincoln, R.I	Yes	Not since 1966	Business	President of a trucking firm T. Delfarno Trucking Company. Holds authority to transport building supplies from Providence, R.I., to points in New England. Used the ferry but discontinued use because of delays. Trips to Long Island would be 1 day instead of 2 as presently, but would need service by 7 a.m. to make Long Island deliveries at 9 a.m.
23. Mathew J. Cimini	North Providence, R.I.				Was dispatcher for T. Delfarno Trucking Company during 1965-68. Testified concerning inability to get trucks on the ferry prior to discontinuing use of the ferry service.
24. Lydia Best	Groton, Conn	Yes	Twice in [illegible] years	Pleasure	In summer of 1972, she was warned if she took her car over she might not be able to get it back that day. She was concerned about a bridge in this area.
25. Linda Parker	do	No			Will not use the ferry because it doesn't permit reservations.
26. Ella May Bernard	Greenfield, Mass	Yes	Twice a month in 1963, once a month now.	To see a doctor.	On two Fridays in July 1973 had to drive around because ferry was full. Had to wait 1.5 hours each time for a ferry on two trips in August. Her husband missed one-half day of work on October 12, same thing.
27. Bernard Coulombe	Rockville, Conn	do	Once a day June through October.	Business	Hauls exempt commodities from Long Island to points in Massachusetts from June to October. Had long waits—10 a.m. until 2 p.m. On two occasions drove around. With applicant's service he believes he could make more trips and save miles.
28. Father Paul C. Kintzing.	Providence, R.I	do	Once a year	do	Usually has a 4-hour wait. Would like a reservation system. Last time, no wait at all.
29. Caslava Mason	Greenfield, Mass	do	Once to twice a summer	Pleasure	One time had to wait 6 hours and another was turned away.
30. Jacqueline Kintzing.	Providence, R.I	do	Once a year		Asked to have a reservation system but was refused.
31. Ernest York	Mars Hill, Maine	do	Every day between August and October.	Business	He is a trucker hauling exempt commodities (potatoes) from August to October. On one occasion he had to wait 7 hours. On other occasions he had to wait 4 hours. He has had to drive around when unable to get a ferry.

Applicant's public witnesses—Continued

Name	Location	Used	Frequency	Reason	Comments
32. Howell Topping	Wainscott, N.Y.	Yes	Three trips a week from July through September.	Business	Operates a truck and farm. He transports potatoes, and uses the ferry to save time to comply with driving time regulations. Has had waits of 6 hours. Drives around once a year. Hauls seed potatoes during April without trouble. He has had to crawl out the truck window when loaded.
33. Raymond Fayer	Stonington, Conn	do	Seldom	Pleasure	Would use the service more if he could get reservations.
34. Phillip Michalowski.	New London, Conn				Is the developing coordinator for New London and testified concerning the railroad crossing adjacent to applicant's docking facilities, and efforts to get permission to retain the present crossing instead of an overpass.
35. Barbara Meilchner	Southampton, N.Y	Yes	Twelve times annually		Attends college in New London. Had to wait 2-4 hours for a ferry. Once 6 hours.
36. Robert T. Turk	New London, Conn				Is executive director of the New London Redevelopment Agency. Testified the proposed service would help rejuvenate the docking area of New London.
37. Frank E. Hawley	Shelter Island, N.Y.	Yes	Three or 4 times annually.	Pleasure	Poor service in the summertime. On August 24, 1973, arrived at 9:30 a.m. but was told the first ferry he could catch would be 2 p.m. Drove around. Has driven around in the past because of the fear of being unable to board without a long wait. Has used the ferry in October with no problems.
38. Edmond McTernan	Stony Brook, N.Y.	do	Ten-12 times annually	Business	Drives around to Boston because of trouble with the ferry service, but uses it from New London. Has waited as much as 6 hours. On one occasion, just before Thanksgiving, could not board last vessel.
39. Gertrude Reilly	Sag Harbor, N.Y	do	Ten times annually	Pleasure	Has waited 6 or 7 hours. Would prefer reservations. Saves 500 round trip miles by using the ferry. In November had no trouble using service.
40. Helen Braem	do	do	Two times a year	do	Always waits in summer up to 3 hours. Has ceased to use the ferry because she couldn't get back into the car after it was parked. Once her small car was bumped to permit another car to board.
41. Edward [illegible] Foster.	Shelter Island Heights, N.Y.	do	Four or 5 times annually.	Pleasure and business.	Saves substantial mileage by using the ferry. Offered evidence from his diary which shows he had very short waits on some occasions and 3-hour waits on other occasions.
42. Loraine Terry	Orient, N.Y.	do	Not much recently		Represents the North Fork Environmental Council and supports applicant in order to have improved transportation to protect the environment. Was not fully aware of the possible consequences of applicant's proposed service on the environment.

Applicant's public witnesses—Continued

No. W-1273
Appendix

Name	Location	Used	Frequency	Reason	Comments
43. Barbara Busch	Kismet, N.Y.	Yes	Not in 1973	Pleasure	Had to wait 3 3/4 hours for a boat because the fog forced cancellation of the boat at 8 a.m. Would like a reservation system.
44. Agnes McGonigle	Southold, N.Y.	do	Five or 6 times annually.	do	Had a friend unable to board because of a lack of passenger lifesaving facilities. On one occasion waited 6 or 7 hours because the first ferry was full and the rest were late.
45. Gilbert C. Hanse	Babylon, N.Y.				Testified as the Commissioner of Commerce and Industry of Suffolk County, N.Y. It encourages economic growth of industry and tourism. Suffolk is expanding economically, and many persons do business with persons in the New England States. Would increase tourism from New England. Also testified as to a proposed bridge between Oyster Bay and Rye, Wading River, and New Haven. Recently the bridge plan was abandoned.
46. Mrs. Walter Butterfield.	Southold, N.Y.	Yes	Four-6 times annually up to 1973.	Medical and pleasure.	Had to climb over cars. No provisions for handicapped people. No longer takes it during peak periods. Would like a reservation system. Does not wait, instead drives around.
47. George Tailer	Huntington, N.Y.				Represents the Long Island Builders Institute composed of members of the building trades in Nassau and Suffolk Counties. They believe transportation costs would be reduced by not having to go through New York City.
48. Will Rupprecht	Mattituck, N.Y.	Yes	Occasionally	Business	Cannot get on without a substantial wait (4 hours). Would save 125 miles each way if he could use the ferry. Makes the trip 3 times a month. Tried to use ferry 10 times, but got on only 3 times.
49. Ronald Busch	Southold, N.Y.	do	Once, September 1972	Pleasure	Went over O.K. Had to wait 4 hours coming back on a weekend. Didn't feel safe.
50. Mrs. Helen C. Harrington.	Shelter Island Heights, N.Y.	do	Infrequently August and October 1973.		Too much vibration and unattractive vessel. No provisions for handicapped people.
51. Ange Panagopoulos	East Marion, N.Y.	do	Once	Pleasure	Was unable to get the last ferry. Went as a boat passenger once. Found conditions unsafe in his opinion as an experienced seaman.
52. Leonard Neil Axinn.	Northport, N.Y.	No			Represents Axinn and Sons Lumber Company which manufactures building supplies. It sells to customers in New England and delivers by its own vehicles, twice a week to New England. Does not use the ferry because of its erratic service, but would use a service providing reservations. Would increase the movements to New England to three times weekly.
53. Barbara Luce	Shelter Island Heights, N.Y.	Yes	Once in 1968 and 1973 but did not get on other unspecified times.	Pleasure and business.	In 1968 could not board last ferry after 4-hour wait nor first boat in morning then drove around. On October 10, 1973, could not get first boat out, although arrived at 7 a.m.
54. Arthur Tyrell	Orient, N.Y.	do	Once in 1973		Arrived October 12, 1973, at 8:25 a.m. to catch 9 a.m. ferry, unable to board, left at 11 a.m. On return was late and weather was bad. Had two friends that drove around because of the long lines.

No. W-1270
Appendix

Applicant's public witnesses—Continued

Name	Location	Used	Frequency	Reason	Comments
55. Robert Dillingham	Cutchogue, N.Y.	Yes	Three-4 times	Pleasure	Arrived in July 1973, at 1 p.m. and was only on as standby for the 4 p.m. boat. Went over with a friend instead and had car brought over later. This happened in 1972 and 1973. Has seen as many as 25 cars turned away after he arrived. Anticipates service by applicant every hour.
56. Mary Whalen	East Marion, N.Y.	—Do—	Six-10 times annually	—do—	Finds the boat dirty and feels it is unsafe. Has observed cars being unable to board the ferry.
57. Lloyd Moote	Greenport, N.Y.	—Do—	Twelve times, all prior to 1973.	—do—	Has been able to board only 7 out of 12 attempts. Used it first at Thanksgiving 1970. Vessel was canceled because of weather. Was able to get on immediately three or four times but had to wait on other occasions. Has observed cars left behind.
58. Gladys Csajko	—do—				Represents the Council of Allied Associations, an organization of 31 civic and property owner associations in Southold township. It supports applicant to get an improved service, but objects to the transport docking facilities because of the traffic congestion. No Greenport organizations belong to the Council.
59. Sebastian Conti	Sag Harbor, N.Y., and Providence, R.I.	Yes	Once every 2 weeks	Pleasure	Had to wait 4 or 5 hours for a ferry. On Thanksgiving, 1973, he met his boss who had left 4 1/2 hours early still waiting to cross. He didn't wait, but drove around. Saves 200 miles by taking ferry.
60. Lincoln Bernbach	Sag Harbor, N.Y., and Greenfield, Mass.	—Do—	Twice in 1973	—do—	Has used ferry only two times in 1973, because of the hassle of driving to New London and being unable to board and then driving around. Would save over 100 miles a trip by using the ferry. He makes a trip to New England once or twice every 2 weeks.
61. William Robin Pell.	Greenport, N.Y.	—Do—	Once a week now, twice a week in the future.	Business	Operates as a trucker of exempt commodities. It is cheaper than driving around. No problem in winter, rest of time there is frequently a wait. Reservations would benefit witness.
62. Father James J. Barry.	Shelter Island, N.Y.	—do—	Infrequently in winter, often in summer.	To get to the retreat.	Works with teenage retreats at Shelter Island. Cars are packed so tight, people on occasion must exit through a car window. Had to wait 4 hours at times. Has had to drive around when the ferry was not running. Would like a reservation system.
63. Price S. Topping	Sagaponack, N.Y.	—do—	Two times a year	Pleasure	August 17, 1972, had wait of 3-4 hours. December 25, 1972, had a 2-hour wait. September 28, 1973, 4-hour wait going and 2 1/2-hour wait returning. Wants more service, not reservations. Saves 175 miles by not driving.
64. George Loucher	Hampton Bays, N.Y.	—do—	Three times in 1973	—do—	August 1973, had a 4-hour wait. Complained as to cleanliness of vessel.

Applicant's public witnesses—Continued

Name	Location	Used	Frequency	Reason	Comments
65. Robert [illegible]----	Cohasset, Mass., and Cutchogue, N.Y.	Yes----	Fifteen times annually--	Pleasure-----	Used day of hearing, loading was delayed 10 minutes. Uses the ferry five or six times a year with his car, rest as passenger. Had no trouble at Thanksgiving, although boat grounded but then it had no trouble backing off and docking. Had a 4-hour wait on Labor Day. Bought a car in 1972 to leave at Orient Point to avoid the long wait. On Thanksgiving he was unable to board with his family because the capacity of the liferafts were not sufficient. After November 15, the Coast Guard requires liferafts rather than lifejackets for passengers. As a result he had to drive around. Has seen others left behind, and has waited as long as 4 1/2 hours.
66. John Beattie-----	Sag Harbor, N.Y.----	---do---	Seldom--------------	----do------	Used 6 or 7 years ago and since then has only picked up or delivered friends at the ferry. Drives around instead. Would like to see a bridge put in and supports applicant because there no longer are plans to put in a bridge.
67. John F. Mullali-	Southold, N.Y.------	---do---	Six times a year personally, 2 times a week company truck.	Business------	Represents Long Island Oyster Farms, Inc., which markets 5 percent of its production in New England. Occasionally trucks have to go around. This causes delays in unloading. A reservation system would alleviate this problem.
68. Mrs. Agnes Cross.	Shelter Island, N.Y-	---do---	Once in 1973----------	Pleasure-----	Would like year-round service. Has had friends drive around rather than wait. Believes boats are unsafe.
69. Peter J. Warren.	Laurel, N.Y--------	---do---	Used to be twice a month on weekends but only 3 one-way trips in 1973.	Business and pleasure.	Could never get on the scheduled ferry he aimed at. Has waited through three ferries and at times has driven around. Coming back has made the ferry twice out of 25 tries. Saves 200 miles by using the ferry. Would use a reservation system.
70. Raymond [illegible]-	Montauk, N.Y--------	---do---	Several times a year--	Pleasure-----	Represents the Montauk Point Lions Club. Supports the application in the hope of increasing the number of tourists vacationing on Long Island. Personally operates two motels with 15 or 20 percent of his customers coming from New England. Has taken skiing trips to Vermont. Saves 175 miles by taking the ferry. There is a need for year-round ferry service.
71. Ormand [illegible]----	Shelter Island, N.Y.	---do---	Has not used it since August 1972.	------------	Last time he used it, first ferry was full and had to wait for the second. A reservation system would be useful.
72. Frank Maki------	Riverhead, N.Y------	---do---	----------------------	Business-----	Represents Lipco Adway, which receives seed potatoes and ships fresh potatoes between the middle of February through the end of October. Two hundred truckloads of seed potatoes. Has talked to truckers and they said service was too irregular with 2- or 3-hour waits.

No. W-1270
Appendix

Applicant's public witness—Continued

Name	Location	Used	Frequency	Reason	Comments
73. Bob Goldstein	Mattituck, N.Y	Yes	Personally once every 6 weeks.	Business	Represents Adway Corporation which ships fertilizer. Little moves to points in New England. It operates its own equipment via the ferry to New England. He uses it on business, must arrive early, but usually gets first boat. Saves 200 miles by using the ferry. A reservation service would be a big help. Winter weekend service would be of no benefit.
74. Walter C. Barber.	North Haven Shores, N.Y.	do	Two trips in 1973	Pleasure	On September 15, 1973, other cars were loaded ahead of witness, although he got on. October 28, 1973, water was rough and witness felt ill. Saves 170 miles by not driving, only 30 miles by ferry. Would like to make reservations.
75. Jane Smyle	North Haven, N.Y	do	Not since Christmas 1972.	do	On occasion had to wait for the second or third boat, then had to crawl out the window to get on deck. Has driven out to the dock and could not get on. So drove around. Witness also offered a letter written by her mother describing her experiences in using the ferry.
76. Ralph Smyle	do	do	do	do	Husband of Jane Smyle. Has driven around when unable to get on. Similar to his wife's testimony.
77. Adolph Westerland.	Peconic, N.Y	do	Ten to 15 years ago 2-6 times a week for business. Now occasionally for pleasure.	Business and pleasure.	Formerly a truck driver for Steve W. Stepnowski, transporting produce. Had to wait, then sometimes trip was canceled and had to go around. December 9, 1973, drove down to ferry and found out it was canceled, so had to go around. One hundred and seventy miles more than by ferry.
78. Virginia Whitman.	Shelter Island, N.Y.	do	Five trips between August through November 1973.	Pleasure	Observed on November 11, 1973, a Mercedes Benz given special treatment by being put ahead of other cars which were waiting. A reservation service would be good as it would save the witness time.
79. Doctor James Johnson.	Southampton, N.Y.	do	Five or 6 times in 11 years.	do	Long waits of up to 4 hours for a ferry. One time a boat came in, but no one was allowed to load. The vessel had broken down, but those waiting were not told for one-half hour. Another time he rented a car, so his family could go as passengers. Offered letters he had written his representative. Would like a reservation system.

No. W-1272
Appendix

Applicant's public witnesses—Continued

Name	Location	Used	Frequency	Reason	Comments
80. George S. Young	Mattituck, N.Y.	Yes		Pleasure	On October 12, 1973, waited in car on vessel and could not get out because of closely parked cars. Has waited 1 1/2 to 2 hours. Once he left because he would have to wait, and stayed overnight at a relative's and got on in the morning. October 9, 1973, had to wait 2 1/2 hours.
81. Natalie Young	do	do	Five times	do	Wife of George Young. Waits were closer to 3 1/2 hours. Saw oil on the deck from a valve left open. Made her nervous. No supervision of children by NLFL's employees.
82. Thomson Murray II	New York, N.Y.	do			Has a summer home in Southampton, N.Y. Drove down to get the ferry, but the line was so long he did not stop.
83. Thomas L. Jernick	Shelter Island, N.Y.	do		Business	Supervisor of the town of Shelter Island. Offered a general resolution of the town board in support of the application. In addition, witness is an agent for National Van Lines, which moves household goods to points in New England. At times the driver has been unable to take the ferry and because of restrictions on driving time has had to lay over. Has used the ferry without problems in spring and fall. A service operating in winter only on weekends would not help.
84. Malcolm Newbourne	Farmingdale, N.Y.				Owns Hamilton Motor Lines which runs between all Long Island points, and points in New York. It operates 20 tractors, 51 trailers, and 10 straight trucks. It interlines with New England carriers. It would attempt to have the connecting point changed if the application were granted. Serves Long Island twice a week in summer, once a week in winter, but with a reliable service it would be three to five times a week.
85. John Lucas	East Quogue, N.Y.	Yes	Once a month	Pleasure	On July 16, 1973, had to wait 3 1/2 hours to board then the muffler came off when getting off the vessel. He filled out a report. He sent a bill for the temporary repair and one for the full repair which he did himself. Protestant did not reply. He stated his daughter and her husband had to go around because of the long wait.
86. Paul Lucas	do	do	do	do	Son of John Lucas. Was unable to board once because although only seven cars were taken a busload of people filled up the available passenger space permitted by the Coast Guard. On another occasion he got his car and five trucks and a Volkswagon on the vessel, but cars were left. On December 6, 1973, he arrived and was told there would be a 45-minute wait, but doubted this and, therefore, drove around. A reservation system would help.

No. W-1270
Appendix

Applicant's public witnesses—Continued

Name	Location	Used	Frequency	Reason	Comments
87. Theresa Celic	Aquebogue, N.Y.	Yes	Six-eight times in 1973.	Pleasure and business.	Did not like the sound or look of the ferry. On Labor Day weekend she slept in the car to be assured of a place on the ferry in the morning. Believes a reservation system would be helpful. Also submitted a letter from Mercy High School indicating support for applicant as a safer ferry service. Has had to wait 4 hours in summer on weekends.
88. Jim Hubbard	Greenport, N.Y.	do		Pleasure	Testified as to the efforts of Greenport to get better ferry service. The board of trustees approved of the plan by applicant. When he uses the ferry he parks his car in line and goes home, then returns in time to board. A reservation system would benefit him.
89. John Ernest	Mattituck, N.Y.	do	Thirty times a week during the potato season.	Business	Manager of Fargo Potato Company, which buys and sells potatoes in New England. The company hires the trucks. They use the ferry. Sometimes they cannot get on and have to go around which takes much longer. Not using the ferry is inconvenient because deliveries must be timely.
90. Raymond Weskhofske.	Bridgehampton, N.Y.	do	Twice a day in season	do	A potato grower and shipper. He ships to points in New England by truck. Using the ferry causes delays in waiting for vessel space. If he cannot board until late he misses the market. Then an entire trip is lost. Uses Lowell Topping, Wayne Giddie, and Winston Ward to move his potatoes.
91. William Otto	Coram, N.Y.				Represents the Nassau County Department of Transportation which indicates a need for an improved service.
92. Nicholas Montemarano.	Montauk, N.Y.				Operates a resort hotel and conference center with 125 rooms. Between November and February, 75 percent of his business is derived from conferences. Better transportation would benefit witnesses' business. States there have been times when guests had to wait for a ferry or had to drive around.
93. William Grover	Riverhead, N.Y.	Yes		Business	Sales manager of Agway, Inc., in charge of marketing fresh produce at points in New England from Long Island. The products are moved by truck. Late deliveries result in loss of money. It has potatoes moving from August through October, 10 movements a day, with a total of 100 movements moving to points in New England. Does not control the routing of truckers hired.
94. Charles O. Frazee	Mattatuck, N.Y.	do	Two or three times a year.	Pleasure	On December 9, 1973, had to drive around because no more boats were running. Had to wait from 7 a.m. until 4 p.m. to get a boat on August 3, 1973. A reservation system would help. Believes the service has deteriorated over the last 5 years.

Applicant's public witnesses—Continued

Name	Location	Used	Frequency	Reason	Comments
95. Joseph Behan	Montauk, N.Y	--------	--------------------	------------	Operates a party fishing boat year round. Customers have complained about the long wait for a ferry. Fifteen percent of his customers come from New England. Believes the reservation system would benefit his business.
96. Stanley Poole	East Marion, N.Y	No	--------------------	------------	Has observed people waiting for the ferry; some sit in their cars and run the air conditioners; others set up their camping gear.
97. George W. Wetmore	Greenport, N.Y	Yes	Not since 1962	------------	He is in the real estate business and believes the present ferry service hurts his business.
98. Thomas F. Higgins	Massapequa, N.Y	--do--	Once or twice a week	Business	Sells firetrucks and rescue equipment. Drives car down at night, then has wife drive him down in the morning to get boat. Coming back has employees of protestant bring car over when they can and he goes as a foot passenger. Repairmen are ordered to drive around and customers pay for this time. About 12 times a year the servicemen cannot get a ferry and will not drive around so customers have to pay for an overnight stay. Saves 2 hours of driving time to use the ferry. A reservation system would be a benefit to his business.
99. James R. Douglas	Orient, N.Y	--do--	Uses the ferry four times a week.	--do--	Operates with his father, Robert Douglas, Orient Trucking and Construction Company, which operates three tractor-trailer units. Transports seafood to points in New England. Has had to wait up to 6 hours for service. Does not believe one of protestants vessels is safe for a tractor-trailer, and the other two are too small. Had trouble getting out of the cab. Had to drive around because of the long wait. Would like a reservation system.
100. Hugh Halsey	South Hampton, N.Y	--do--	Two or three times a year.	Pleasure	Had to wait 2 1/2 hours on Sunday, October 21, 1973. Had to drive around the next day because he could not get on the last ferry. Would like a reservation system.
101. Robert Douglas	Orient, N.Y	--do--	--------------------	Business	Father of James R. Douglas. Witness deals with heavy construction machinery. Operates seven dump trucks and three flat-bed tractor-trailer units. Could not use the ferry on one occasion so had to drive around. Would have saved 400 miles by using the ferry. If he could reliably use the ferry would pick up materials in New England and thereby save time and expense.

Unsponsored public witnesses

Name	Location	Used	Frequency	Reason	Comments
1. Robert C. Thomas	Manhasset, N.Y.	--------	--------------------	--------------	Represents the Mid-Suffolk Crossing Task Force which is composed of 150 business organizations. Because of the end of the proposal to build a bridge the organization is now more interested in the ferry service. The organization supports fast, frequent, and foolproof ferry service as a necessity of sound economic growth in this region. To that end it urges that existing facilities be upgraded and new vessels acquired with an hourly schedule. Stated the prospect of a bridge was real issue until June 1973.
2. Thomas Jurzenia	Greenport, N.Y.	--------	--------------------	--------------	Is concerned with the extra traffic unloading at applicant's dock in Greenport adding to the existing congestion.
3. Edgar Marvin	Southold, N.Y.	--------	--------------------	--------------	Is concerned with all factors, including life style of the Greenport people and the effect of additional vehicles on the pollution. He objects to any ferry service in Greenport.
4. Nancy Graham	Greenport, N.Y.	--------	--------------------	--------------	Sails during summer and has observed others sailing and fears the intrusion of a large ferry would create a traffic hazard. Says that sailing boats might go elsewhere and the city merchants would lose money.
5. May Watson	do	--------	--------------------	--------------	Objects to the location of the ferry because of the traffic problem and believes she would lose tourist business because of the ferry.
6. Arthur Levine	do	--------	--------------------	--------------	Opposes the location of the ferry in Greenport because such a service would damage the Greenport businesses.
7. Lorraine Terry	Orient, N.Y.	--------	--------------------	--------------	As an individual is concerned about the location of the proposed ferry. Had testified earlier as the representative of the North Fork Environmental Council.

Protestant's public witnesses

Name	Location	Used	Frequency	Reason	Comments
1. Michael R. Giordano.	New London, Conn.	No	--------------------	--------------	Operates a concession stand across from protestant's landing in New London. He also rents parking space for foot passengers on the ferry. He fears losing some business if the application is granted.
2. Reverend Thomas C. Truscott.	Westhampton Beach, N.Y.	Yes	Four or five times annually.	--------------	Is aware of delays during peak periods but is able to schedule his trips for other times. Is concerned with the use of a large boat in Greenport. Has always been able to take his auto on the ferry, never waiting more than 2 hours.
3. Robert B. Baird	Quogue, N.Y.	do	One to four times a month.	--------------	Has had to wait. Waits for 1 hour. Has observed cars left behind. Has found the service comfortable and employees courteous.
4. Arthur Charles Lorenzo.	Coram, N.Y.	do	Fifteen-25 times annually for the company, 3 times personally.	Business	Represents Lyon, Inc., which has 11 affiliates engaged in various businesses. They have used the ferry service. Personally has not had any major delays.

No. W-1270
Appendix

Protestant's public witnesses—Continued

Name	Location	Used	Frequency	Reason	Comments
5. Henry J. Rendick	Babylon, N.Y.	Yes	Four times annually	Pleasure	Is a relative of the owners of protestant New London. Has never seen anyone receive preferential treatment. Waited only 1 hour on November 9, 1973, with ferry not full. On Sunday, November 12, was timely for next boat. Although he boarded ahead of others, was not given special treatment. Was only placed in a spot suitable for his car.
6. Morris Segal	Riverhead, N.Y.	--do--	Forty-50 times annually.	Business	Represents Segal Bag Co. which is the distributor of bags for produce and grocery and corrogated containers throughout New England. It has three tractor-trailer units and three trucks. Finds service generally satisfactory. Traffic moves all year round. Drivers have waited for a couple of hours. Had to drive around three or four times a year.
7. Herbert Faust	Middle Island, N.Y.	--do--	Two-five times a year	--------------	Was in charge of transportation for a school district 2 years ago. Field and athletic trips were taken to New England on occasion. Had no difficulty with the ferry. Personally had to wait for next boat, but basically satisfied with the service.
8. Edith H. Wilson	Quogue, N.Y.	--do--	Three or four times a year.	Pleasure	Has found the service quite adequate by planning to avoid the peak crowds. Once the boat returned to pick her up, which she indicated was nice. She states the crews have always been courteous and the boats clean and seaworthy. Has waited generally not more than an hour for a boat, except once for 2 hours.
9. Thomas Conoscenti	Nesconset, N.Y.	---------	---------------------	--------------	Prepared an economic study on the feasibility of two ferry lines operating between New London and Long Island. He concluded that such operations were not feasible. Certain questions were raised as to the accuracy of the base used in the analysis.
10. Ralph L. Otis	Quogue, N.Y.	Yes	---------------------	--------------	Found the service satisfactory and does not believe there is a need for additional service.
11. Dr. Douglas H. Smith.	---------------------	---------	---------------------	--------------	Opposes the operation of applicant into the Greenport harbor because of its crowded nature. In addition the added traffic would be bad for downtown Greenport. He also feels applicant is not financially fit.

SECTION 5a APPLICATION NO. 10 (AMENDMENT NO. 7)

WATERWAYS FREIGHT BUREAU—AGREEMENT

Decided November 17, 1976

Proposed amended ratemaking agreement found not to comply with Ex Parte No. 297 or comport with the essential standards of section 5a of the Interstate Commerce Act. Proceeding held open for a designated period to afford applicants an opportunity to present an agreement in conformity with the conclusions reached.

Wesley A. Rogers for applicants.

REPORT OF THE COMMISSION

DIVISION 2, COMMISSIONERS HARDIN, O'NEAL, AND CHRISTIAN

BY DIVISION 2:

In the prior report, 277 I.C.C. 593, the Commission, Division 2, approved, subject to terms and conditions, an agreement, under section 5a of the Interstate Commerce Act, between and among water common carrier members of Waterways Freight Bureau (bureau), relating to the joint consideration, initiation, or establishment of rates, charges, rules, and regulations applicable to the transportation of property on the Mississippi River and tributary waterways. Upon compliance with the terms and conditions, an order was entered on May 17, 1950, approving the revised agreement. Further amendments to the agreement were approved on December 23, 1954, July 16, 1956, May 3, 1957, and February 4, 1958.[1]

By application filed April 15, 1976, under the provisions of section 5a of the act, the bureau, for and on behalf of itself and the member carriers party to the agreement seek approval of further amendments to the agreement to conform with the standards promulgated by the Commission in Ex Parte No. 297, *Rate Bureau Investigation*, 351 I.C.C. 437, and to make other incidental changes.

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[1] The record shows that the docketing of this proceeding as amendment No. 7 included certain amendatory applications supplementary to pending applications which amendments are embraced in the four cited approval orders. Consequently, amendments Nos. 5 and 6 will not be utilized in this proceeding.

The application is unopposed. No oral hearing was requested and none was held. The agreement consists of articles of agreement and bylaws of the bureau.

The further amendments to the articles and bylaws are to provide: (1) a 120-day period for final disposition of ratemaking proposals by adding a new paragraph 8a of the articles (in lieu of present paragraph 8, which is incorporated in paragraph 7); (2) the disposition notice to state reasons for action taken by adding a phrase to paragraph d of article VI of the bylaws; (3) notice of the broadening of the territorial or commodity scope of proposals by adding a new paragraph 8b of the articles; and (4) public notice of independent action proposals in revised paragraph 7 of the articles.

We have no objection to the proposed amendments. However, the amendments, when viewed in their entirety, fall short of full compliance with the report and order in Ex Parte No. 297 by failing to comply with findings 4, 8, 9, 10, 13, 21, 22, and 23 thereof, relating to: (a) the requirement that formal minutes be maintained of rate committee proceedings (finding 4); (b) the prohibition against the bureau investing in another commercial business whether related or unrelated to its primary function of processing and causing to be published rates and related matters for its member carriers (finding 8); (c) the prohibition against acquisition of other rate bureaus without prior Commission approval (finding 9); (d) the requirement that the bureau specifically state that it is a nonprofit organization (finding 10); (e) indication whether public notice of a proposal will *or* will not identify the proponent of a proposal (finding 13); (f) the prohibition of the rate bureau from protesting any rate proposals of carrier members (finding 21); (g) provision against the rate bureau discouraging member independent action proposals (finding 22); or (h) precluding the rate bureau from discouraging publication of individual tariffs (finding 23).

As previously indicated, the initially approved agreement has been amended from time to time, the last in 1958. Pursuant to paragraph (7) of section 5a, a reexamination of the amended agreement has been undertaken to determine whether it conforms to the standards established by and under section 5a of the act, other than noncompliance with Ex Parte No. 297 as hereinbefore discussed.

The essential elements or standards for approval or continued approval of section 5a agreements require, among other things, that the agreement set forth (1) the procedures governing carrier collective ratemaking activity in an orderly manner with reasonable definiteness; (2) adequate public notice of every proposed new or changed rate, charge, rule, or regulation and of the recommended and/or final disposition of ratemaking proposals; (3) adequate opportunity for interested persons to participate in the collective process through representations, orally or in writing, for or against a proposal prior to carrier determination; (4) restricting the bureau to so-called housekeeping functions on behalf of the carrier members party to the agreement with the ultimate responsibility and authority regarding rate policies and the establishment of rates vested in the carrier membership; (5) the duties and functions of rate committees should be limited to making studies and recommendations and not the maintaining and changing of carrier rates; and (6) preserve to each carrier the free and unrestrained right of independent action.

Review of the considered revised agreement discloses that it does not provide definite procedures for the initiation and processing of ratemaking proposals nor authorizes shippers or other interested persons to file proposals, and makes no provision for voting on rate proposals, subject to action by the majority of the members, or states any quorum requirements for member meetings. Moreover, too much power and authority is vested in the chairman. For example, under bylaw articles II and VI, the chairman calls meetings of the governing member-carrier executive committee and of the subscribing carriers (membership), particularly in respect to so-called "traffic matters" apparently relating to ratemaking proposals.

It cannot be determined when a proposal is initiated because paragraphs 5 and 6 of the articles of agreement authorize each subscribing carrier to advise the other subscribing carriers in advance of the issue date of proposed rates and related matters which may be followed by general discussion and consideration. Under the agreement, a subscribing carrier can discuss and consider any matters at any time or place, and by any method of communication to which the agreement applies. Such carrier activity does not constitute adequate ratemaking procedures within the meaning of section 5a of the act.

Paragraph 7 of the articles of agreement accords carriers the free and "unrestricted" right to take independent action. Under paragraph (6) of section 5a of the act, each member carrier must be accorded the free and unrestrained right of independent action. The term "unrestricted" is not so broad a right as the statutory required "unrestrained" right. The agreement also fails to provide any standards for the assessment of member dues or provisions for termination of membership for nonpayment of financial obligations to the bureau and for reinstatement upon payment.

We conclude and find that the considered agreement, as amended, does not fully comply with the standards promulgated by the Commission in Ex Parte No. 297 or meets the essential standards established by and under section 5a of the act to support a finding that such an agreement will be in furtherance of the national transportation policy.

The record will be held open for a period of 3 months from the date of service of this report to enable the applicants to present a revised agreement in harmony with the conclusions reached herein. If such an agreement is not filed within that period, an order dismissing the application and terminating approval of the agreement in force will be entered.

Commissioner Christian did not participate.

No. 36165

DOLOMITE, DEVAULT, PENNSYLVANIA TO CAPE MAY, NEW JERSEY

Decided November 22, 1976

Assailed rates on crude dolomite in carloads from Devault, Pa., to Cape May, N.J., found not shown to be unjust and unreasonable, however, found to result in undue preference and prejudice. Schedules ordered to be canceled to eliminate the unlawfulness. In all other respects, proceeding discontinued.

Robert Szwajkos for respondent.
Vernon L. Everngam and *Douglas H. Shaw* for protestants.

REPORT AND ORDER OF THE COMMISSION

DIVISION 2, COMMISSIONERS HARDIN, O'NEAL, AND CHRISTIAN

BY THE DIVISION:

The modified procedure was followed. Exceptions to the initial decision of the Administrative Law Judge were filed by respondents Penn Central Transportation Company[1] (Penn Central) and Pennsylvania-Reading Seashore Lines (Seashore), and protestant Martin Marietta Corporation (Martin Marietta) filed a reply. Our conclusions differ in part from those recommended. Exceptions and requested findings not specifically discussed in this report nor reflected in our findings or conclusions have been considered and found not justified or their resolution unnecessary for the proper disposition of the proceeding.

By schedules filed to become effective April 15, 1975, respondents Penn Central and Seashore proposed to establish an increased rate[2] on crude dolomite, in bulk, in open cars, from Devault, Pa., to Cape May, N.J., from 483 cents to 732 cents. Upon protest of Martin Marietta and Harbison-Walker Refractories, Inc. (Harbison), this investigation was instituted by the Commission, Division 2, Acting as an Appellate Division, on April 14, 1975, into and concerning the lawfulness of the proposed increased rate which became effective on April 15, 1975.[3]

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[1] Robert W. Blanchette, Richard C. Bond, and John H. McArthur, trustees.

[2] Rates are stated in cents per gross ton of 2,240 pounds.

The Administrative Law Judge found that the assailed rate had not be shown to be just and reasonable and otherwise lawful, and ordered the cancellation of the schedules under investigation. On exceptions, respondents concede that the Administrative Law Judge correctly found a section 3 violation. However, they contend that he should have given them the alternative of lowering, raising, or altering the investigated rate instead of ordering its cancellation, citing *I.C.C. v. United States*, 289 U.S. 285 (1933), and *Fargo Chamber of Commerce v. Akron, C. & Y. R. Co.*, 306 I.C.C. 407 (1959). In reply, protestant Martin Marietta maintains that the Administrative Law Judge properly found undue preference and prejudice which should be eliminated by reinstituting the same level of rates from the competing origins.

Although the basic facts are essentially set forth in the initial decision of the Administrative Law Judge, some clarification and elaboration of the initial decision is necessary to eliminate any potential confusion and ambiguity.

Harbison produces large quantities of Dead-Burned Magnesite from magnesium hydrate which is produced by the treatment of seawater with high-quality dolomite. Harbison has received carload shipments of crude dolomite moving from the Martin Marietta facilities at Devault, Pa., to its Cape May, N.J., plant for over 25 years. In 1965 and 1968, rate reductions were implemented by respondents, the first to encourage expansion of the Cape May plant, and the second to meet motor carrier competition. Annual requirements for the shipment of crude dolomite to Harbison are between 240,000 and 580,000 tons. However, Martin Marietta claims that, because of car shortages, it was only able to ship 33 percent of the contracted tonnage during the period 1970 through 1974, the rest of the dolomite being shipped by a competitor at Cedar Hollow or Williams, Pa., originating on the lines of the Reading Company, at the rate of 575 cents (at the Ex Parte No. 313 level). To meet some of its enormous transportation needs, Martin Marietta has used motor common carrier service to transport 600 truckloads of the involved commodity to Cape May at the rate of 644 cents per gross ton. Protestant argues that this motor carrier competition at a lower rate will result in a substantial diversion of revenues from the involved railroads if the assailed rate continues in effect. Since June 1975, no traffic has moved at the assailed rates.

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[3] Subsequent general increases have raised the rate from 732 cents to 843 cents. For convenience and clarity of discussion, the rate which became effective April 15, 1975, will sometimes be referred to as the proposed rate.

Protestants also show that the point-to-point commodity rates on dolomite are 575 cents (Ex Parte No. 313 level) from Cedar Hollow and Williams and 557 cents from Plymouth Meeting and Blue Bell, Pa. (all four points in the same general area as Devault). Martin Marietta claims that the discrepancy between these rates and the rate from Devault (which prior to the increase had been equal to the Cedar Hollow and Williams rates) has prejudiced and will continue to prejudice it by disturbing the freight relationship with its competitors at Williams or Cedar Hollow. Protestants, therefore, urge that the proposed rate be canceled.[4]

Respondents argue that the rate of 483 cents (557 cents at the Ex Parte No. 313 level) is depressed, when compared to variable costs of 528 cents and fully allocated costs of 707.6 cents before the April 15 increase. In addition, respondents claim that the rates between the cited points and Cape May should not be compared to the assailed rate, because the Penn Central/Seashore (Plymouth Meeting and Blue Bell) rates are paper rates, and the Reading/Seashore (Williams and Cedar Hollow) movement has not been shown to have similar transportation conditions. Instead, respondents argue that the proper standard of reasonableness is the general scale of rates on limestone (dolomite is a form of limestone) applicable in the official territory which was 911 cents on July 1, 1975. In reply to protestants' charges that the route used is circuitous, respondents state that, because of changing traffic patterns and crew assignments, a shorter route would now be used, but that the experienced costs on the shorter line (as of July 5, 1975) had increased to 587.8 cents at the variable cost level and 759.5 cents at the fully allocated cost level.

DISCUSSION AND CONCLUSIONS

Reviewing the initial decision and the evidence of record, it is apparent that the Administrative Law Judge determined that there was no violation of section 1 of the act, but that there was a violation of section 3(1). As no exception was taken to the findings concerning section 1(5), we see no neea to discuss further the reasonableness issue.

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[4] Harbison, in its statement filed June 16, 1975, asked that if the Commission found that the assailed rate should be canceled, protestant be permitted reparations in the amount of the excess freight charges paid since that date. No evidence was presented to support the claim for reparation, and in neither the initial decision nor the decision herein is there any finding that the assailed rate is unreasonably high. Therefore, Harbison's request for reparations will not be considered further. See *ASG Industries, Inc. v. Aberdeen and R. R. Co.*, 350 I.C.C. 856, 864 (1975).

The Administrative Law Judge considered the elements of a section 3 violation of undue preference and prejudice. First, he correctly found that there was a disparity in rates between the Penn Central origin (Devault) and the Reading origins (Williams and Cedar Hollow), a difference of 268 cents (at Ex Parte No. 313 levels). Second, he properly found that a crude dolomite producer at one of these preferred points competes with protestant Martin Marietta for Harbison's business. Therefore, an injury results to Martin Marietta when it is compelled to absorb the differences in rates greater than those warranted by differences in service. Third, the respondent carriers were found to be the common source of both the alleged prejudice and the preferential treatment since Seashore had joint rates with both Reading and Penn Central to Cape May from each of the involved prejudiced and preferred points.[5] To justify the rate disparity respondents argued that there was motor carrier competition at the alleged perferred points. The existence of carrier competition at the preferred points, and the absence of such competition at the prejudiced points, are factual matters of defense in justification of unequal treatment which must be proven by satisfactory evidence. Cf. *Continental Steel Corp.* v. *New York, C. & St. L. R. Co.*, 256 I.C.C. 167, 174 (1943); and *Lynchburg Traffic Bureau* v. *Chesapeake & O. Ry. Co.*, 319 I.C.C. 74, 81-82 (1962). This the respondents have not done. Instead, they merely stated that there was competition and that there were different transportation conditions. This contention appears unfounded in light of the motor carrier service at Devault to Cape May and the movements from Reading origins. Finding that all the elements of a section 3 violation were present, the Administrative Law Judge in effect correctly determined that such a violation is present, although he did not state his finding with precision.

Finally, we believe that respondents' primary exception to the initial decision is without basis. All the cases relied on by respondents to support their contention that they must be given the alternative of raising the preferred or lowering the prejudiced rate involved complaint proceedings, *State of New York* v. *United States*, 331 U.S. 284 (1974), *Texas & P. R. Co.* v. *United States*, 289 U.S. 627 (1933), and *Fargo Chamber of Commerce* v. *Akron, C. & Y. R. Co., supra.* A complaint proceeding, which calls into question the reasonableness of an exiting rate, is distinguishable from an investigation proceeding which is initiated before a rate becomes effective. In a section 3(1) complaint proceeding, the Commission is asked to find that an existing rate relationship prefers one or more points to the prejudice of one or more competing points. Because the rates at issue are not changed rates, the burden of proof is on the complainant to demonstrate the inequity in and the competitive harm caused by the existing relationship. The Commission has the power to remedy the prejudice and preference in a number of ways; but, as a finding of unlawfulness runs to the rate relationship, as opposed to either of the specific rates at issue, the Commission ordinarily allows the carriers to cure the unlawfulness by either raising the lower rate or reducing the higher rate. See *Texas & P. R. Co., supra.*

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[5] We note that Penn Central and Reading are now included in the Conrail System.

In an investigation and suspension proceeding (or an investigation proceeding without suspension), on the other hand, the statutory burden of proof is upon the carrier publishing changed rates to show that the rates at issue are lawful. If the carrier fails, as here, to make the requisite showing, then the Commission will normally find that the changed rate has not been shown to be lawful and order it canceled. Cf. *Increased Rates Frozen Fruits & Vegetables,* 351 I.C.C. 676, 684 (1976). Of course, once the unlawful rate is canceled, the respondents are free to adjust their rates within the zone of reasonableness, so long as they avoid the type of unlawful prejudice and preference shown herein.

We find that the proposed rate has been shown to be unduly preferential and prejudicial.

It is ordered, That the respondents herein be, and they are hereby, notified and required to cancel the schedules described in the order entered in this proceeding on April 14, 1975, by Division 2, Acting as an Appellate Division, on or before 35 days from the date of service of this report and order, upon not less than 1 day's notice to this Commission and to the general public, by filing and posting in the manner prescribed by the Commission under section 6 of the Interstate Commerce Act, and that this proceeding be, and it is hereby, discontinued.

COMMISSIONER CHRISTIAN did not participate.

No. 36215

WALDO ROHNERT CO., DBA KEYSTONE SEED CO. PETITION FOR DECLARATORY ORDER

Decided November 24, 1976

Applicability of rail transit privileges determined on movements of vegetable seeds by rail and motor to Twin Falls, Idaho, and after processing shipped beyond by rail. Proceeding discontinued.

Bruce A. Richardson for petitioner.

W. P. Higgins, Robert B. Batchelder, and *Peter W. Hohenhaus* for replicant.

James J. Irlandi, Jon R. Roy, and *Robert L. Lighthall* for interveners.

REPORT AND ORDER OF THE COMMISSION

DIVISION 2, COMMISSIONERS HARDIN, O'NEAL, AND CHRISTIAN

BY DIVISION 2:

The modified procedure was followed. Exceptions and requested findings not specifically discussed in this report nor reflected in our findings have been considered and found not justified. Our ultimate conclusions are the same as those of the Administrative Law Judge.

This proceeding arises from a lawsuit in the United States District Court for the District of Idaho, *Union Pacific Railroad Company* v. *Waldo Rohnert Co., Inc., d/b/a Keystone Seed Company,* civil action No. 1-74-1971, in which the Union Pacific Railroad Company seeks to recover $8,834.76 in unpaid freight charges for the transportation of dried vegetable seeds allegedly due the carriers from the shipper, Keystone Seed Company, pursuant to its tariff 1000-B I.C.C. 5698. The district court suspended the proceedings and referred the tariff interpretation issue to the Commission.

By petition filed June 13, 1975, Waldo Rohnert Co. (hereinafter petitioner) seeks a declaratory order pursuant to the Administrative Procedure Act, 5 U.S.C. 554(e). A notice of this proceeding was issued September 22, 1975. Petitioner filed its opening statement of facts and argument on October 13, 1975. The Union Pacific Railroad Company (hereinafter replicant) filed its statement of facts and argument on December 12, 1975. Statements of facts and argument were filed in support of petitioner jointly by Garvey, Inc., C-G-F Grain Company, Inc., Garvey Elevators, Inc., Garvey Grain Division of Garvey International, Inc., and Lincoln Grain, Inc., jointly by Archer Daniels Midland Company and its subsidiary Tabor and Company, and by A. E. Staley Manufacturing Co. Reply statements were filed by the parties.

The petitioner is engaged in the growing, purchasing, and processing of large vegetable seeds. It maintains a facility at Twin Falls, Idaho, served by replicant, where seeds are shipped in via rail and truck from California and other western points for treating, packing, and storage. The seeds of a given variety received at Twin Falls by rail and truck are commingled. The processed seeds are ultimately shipped via rail or truck to destinations throughout the United States.

The petitioner began to avail itself of replicant's transit arrangements in 1961. Prior to commencing its transit operation, the petitioner's traffic representative set up certain recordkeeping procedures to be followed to insure strict compliance with the policing requirements of the transit tariffs. These procedures were apparently established in consultation with the Western Weighing and Inspection Bureau. At that time, it was determined that it was permissible under the transit tariff to commingle inbound rail and truck seeds. However, this made it impossible to ascertain whether the physical seeds in an outbound rail shipment were seeds that had been transported in via rail.

The petitioner's transit operations and procedures, including the practice of commingling inbound rail and truck seeds, went unquestioned for 11 years. Then in 1972 the Western Weighing and Inspection Bureau and replicant informed the petitioner that it would be liable for additional freight charges because the transit shipments included seeds that had been shipped in via truck. They contended that the tariff only permitted seeds that had moved in via rail to move out under transit.

The issue raised concerns the applicability of transit privileges to the movement of vegetable seeds when the seeds are brought into the transit point by motor as well as by rail and commingled at the transit point. Thus the processed seeds in the outgoing rail movement, although equal to the tonnage carried in by rail, may not be the precise seeds transported on the incoming rail movement.

The petitioner contends that its interpretation of the tariff had been accepted for 11 years; that the tariff expressly authorizes the transit privileges; and that if the transit privileges are not expressly authorized, then the tariff is ambiguous and should be construed in petitioner's favor.

Interveners support the position of petitioner and believe that it has correctly interpreted the tariff. Interveners are all large shippers and processors of grain and grain products. They view this proceeding as an attempt by replicant to force petitioner to keep the nontransit seeds physically separated from the transit seeds. Interveners stress that it is physically impossible to separate the nontransit truck and rail commodities from the transit when dealing with fungibles.

Replicant argues that the transit privileges apply only on shipments moving by rail from the original point of shipment to the transit point and thence by rail to the ultimate rail destination. Moreover, replicant avers that no express authorization for the commingling of trucked-in seeds with seeds shipped in by rail exists in the tariff. In support of this, replicant stresses that numerous items in the tariff limit the transit privileges.

Based upon these facts and arguments, the Administrative Law Judge found that under the subject tariff transit privileges are applicable upon movements of vegetable seeds when the seeds are brought into the rail transit point by truck as well as by rail and, after processing, treating, and packaging, seeds in the outgoing rail movement, although equal to the tonnage carried in by rail, may not be the precise seeds transported on the incoming rail movement but instead may be those having been transported to the processing plant by motor carriers.

Exceptions to the initial decision of the Administrative Law Judge were filed by replicant, on May 10, 1976; petitioner Waldo Rohnert Co. replied on June 1, 1976, interveners Garvey *et al.*, replied on May 27, 1976, and interveners Archer Daniels Midland Company *et al.* replied on May 28, 1976.

Replicant asserts that the past interpretation of a tariff is not relevant in determining its present meaning; that the fungibility of seeds does not support the finding that commingling is allowed by the transit tariff; that *Union Pacific Railroad Company* v. *J. H. Baxter*, 404 F. Supp. 300 (D. Oreg. 1975) requires a contrary result; and that petitioner's interpretation will impair the integrity of the through rate.

In reply, petitioner avers that past practice is a reliable guide to the interpretation of a tariff; that the fungibility of seeds justifies commingling of transit and nontransit seeds; and that *J. H. Baxter, supra,* is distinguishable from this proceeding. Moreover petitioner stresses that commercial necessities in the seed business prevent the impairment of the integrity of the through rate. Petitioner contends that because of product liability and sales purposes detailed records are kept which disclose the actual location where the seeds are grown. Thus there is no danger that local seeds will be commingled with transit seeds. The only commingling that occurs is with rail and trucked seeds from the same location. Therefore, as long as the tonnage leaving the transit point by rail movement is equal to the tonnage that came in by rail, no impairment of the through rate occurs. Interveners support petitioner's position.

Discussion and Conclusions

The contentions of the parties may be illustrated by the following example. Assume that petitioner purchases 2,000 pounds of red kidney beans in Santa Maria, Calif., and ships 1,000 pounds of those beans to Twin Falls, Idaho, by rail and the other 1,000 pounds to Twin Falls, Idaho, by truck. On arrival at the transit point the seeds are commingled so that their specific identity cannot be maintained. Replicant contends that only the physical 1,000 pounds of red kidney beans shipped to Twin Falls, Idaho, by rail may thereafter be shipped out by rail under transit privileges. Petitioner and interveners, on the other hand, contend that petitioner is entitled to transit privileges with respect to 1,000 pounds of red kidney beans, and, since beans are fungible goods, it can ship any of the 1,000 pounds of red kidney beans from Twin Falls to its customers and 1,000 pounds of such shipments by rail qualify for transit privileges.

Petitioner's interpretation apparently went unchallenged by the replicant for at least 11 years prior to 1972. The replicant does not rebut this fact nor does it offer an adequate explanation as to why the tariff suddenly changed. The longstanding construction of the tariff is clearly persuasive here.

Certain transit arrangements would be wholly unworkable if an ironclad rule prohibiting the substitution of nontransit tonnage for transit tonnage were established. As a general rule substitution of transit and nontransit tonnage must be specifically authorized by the tariff. This rule, however, does not apply to fungible commodities which unavoidably become commingled at transit stops.

> *** This we do not regard as a substitution, and in our opinion the practice, if properly policed, is not in contravention of the principle of the act. Where a commodity must of necessity lose its actual identity, as in the case of grain going into an elevator, it would be absurd to say that such identity must be preserved. Nor do we think this view properly subject to such interpretation as may be violative of the law, for it is incumbent alike upon shippers and carriers to see that there is actually on hand at the transit point sufficient and proper inbound tonnage to justify the outbound movement. *Transit Case*, 24 I.C.C. 340, 350 (1912).

Vegetable seeds are fungibles. Under the circumstances, it is not necessary for replicant's tariff to specifically authorize commingling of transit and nontransit tonnage receipts of such articles. On the other hand, if commingling of fungible commodities is to be proscribed, then it must be done by clear tariff language. The tariff does not do so but does specifically allow for substitution in item 3900. There is no provision in item 3900 that prohibits the commingling of transit and nontransit tonnage. We believe this is in recognition of the practical problems in dealing with fungibles. The *J. H. Baxter* case, *supra,* cited by replicant, however, supports this view. Shipments of poles, not fungibles, were involved. Contrary to replicants' position, the court recognized that where commodities unavoidably become commingled at the transit station, such as is the case here, a rule specifically authorizing the substitution of trucked in tonnage is not necessary.

As has been stated, the parties take issue over the relevance of past practice in interpreting a tariff. The past interpretation of a tariff is given a certain amount of weight but is not conclusive.

> *** While the facts that the carrier and the public generally have agreed on the construction of a tariff for a long period of time and shippers and receivers of freight have accepted that interpretation and paid freight charges in accordance therewith without protest is not conclusive that the interpretation is correct, such facts are entitled to considerable weight and are pursuasive [sic] that such an interpretation is the fair and reasonable one to be gathered from the tariffs themselves. *** *Appalachian Power Co. v. Norfolk & W. Ry. Co.*, 152 I.C.C. 389, 392 (1929).

All transit arrangements must be subject to suitable policing rules. The concept is to match the inbound and outbound expense bills and to preserve the integrity of the through rate. Replicant argues that under petitioner's interpretation the through rate "appears" to be impaired. Replicant, however, fails to offer any specific evidence on how the integrity of the through rate is or has been impaired. Petitioner asserts that commercial practices in the seed business will prevent any fraud upon the carriers. The duty rests upon the carriers to police their transit arrangements properly and effectively. If replicant feels that the integrity of the through rate is impaired, then it should adopt rules to remedy the situation or present specific and detailed evidence to the Commission. If, on the other hand, it desires to preclude the practice of commingling these fungible articles, then it should do so by clear and unambiguous tariff language.

FINDINGS AND ORDER

We find that under the subject tariff transit privileges are applicable upon movements of vegetable seeds when the seeds are brought into the rail transit point by motor as well as by rail from the same location, and, after processing, treating, and packaging, the seeds transported out by rail, although equal to the tonnage carried in by rail, may not be the precise seeds transported on the incoming rail movement but instead may be those having been transported to the processing plant by motor carriers.

We further find that this decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

COMMISSIONER CHRISTIAN did not participate.

It is ordered, That this proceeding be, and it is hereby, discontinued.

No. 35944

DRUG AND TOILET PREPARATION TRAFFIC CONFERENCE—PETITION FOR DECLARATORY ORDER—LIABILITY LIMITATION

Decided July 12, 1976

Declaratory order entered determining the meaning of the liability limitation of "50 cents per pound for each article" which is published in the National Motor Freight Classification in connection with released ratings on drugs and related commodities. Proceeding discontinued.

Daniel J. Sweeney for petitioner.

William J. Augello and *W. C. Bath* for interveners in support of petitioner.

Thomas M. Auchincloss, Jr., Robert E. Born, Don R. Devine, S. S. Eisen, James V. Fleming III, Gerald W. Hess, Vincent J. Hudec, William E. Kenworthy, Jeffrey Kohlman, F. H. Lynch, Jr., Larry E. May, G. D. Michalson, W. C. Mitchell, Ducan B. Phillips, and *Bryce Rea, Jr.,* for replicants.

REPORT OF THE COMMISSION ON RECONSIDERATION

DIVISION 2, ACTING AS AN APPELLATE DIVISION, COMMISSIONERS HARDIN, GRESHAM, AND CORBER

CORBER, *Commissioner:*

In the prior report entered July 3, 1975 (not printed), Review Board Number 4 modified the initial decision of the Administrative Law Judge interpreting the liability limitation of "50 cents per pound for each article" as published in the National Motor Freight Classification in connection with released ratings on drugs and related commodities, pursuant to authority granted in Released Rates Order No. MC-342. By order dated November 14, 1975, the proceeding was reopened for reconsideration on the present record. Requested findings not specifically discussed in this report nor reflected in our findings or conclusions have been considered and found not justified.

In Released Rates Application No. MC-525, dated June 9, 1952, certain carriers named in the National Motor Freight Classification and the American Trucking Associations petitioned the Commission for authorization under sections 20(11), 219, and 413 of the act to establish and maintain ratings for the transportation of property dependent upon the agreed or declared value stated therein, namely, "50 cents per pound for each article." The Commission granted the application pursuant to Released Rates Order No. MC-342, dated August 13, 1952. The ratings were subsequently published in the National Motor Freight Classification.

By petition filed on January 8, 1974, the Drug and Toilet Preparation Traffic Conference (petitioner), on behalf of its members, requested the issuance of a declaratory order interpreting the liability limitation on drugs and related commodities authorized in Released Rates Order No. MC-342 and published in the National Motor Freight Classification. The limitation provides for a certification by the shipper that "The agreed or declared value of the property is hereby specifically stated by the shipper to be not exceeding 50 cents per pound for each article." Petitioner, in effect, alleges that the liability limitation is ambiguous and that different interpretations of it are being applied by carriers in processing claims for loss and damage.

By order entered on April 25, 1974, the Commission, Division 2, determined that a controversy or uncertainty exists which would warrant the entry of a declaratory order, and it instituted a proceeding to determine the question presented. Interveners in support of petitioner are Farmland Industries, Inc., and Shippers National Freight Claims Council. Appearing as respondents in opposition are the Freight Forwarders Conference, Hennis Freight Lines, Inc., Middlewest Motor Freight Bureau, National Freight Claim Council of American Trucking Associations, Inc., National Motor Freight Traffic Association, Inc., Roadway Express, Inc., Rocky Mountain Motor Tariff Bureau, Inc., Reisch Trucking and Transportation Company, Inc., Southern Motor Carriers Rate Conference, Inc., and Southern Railway Company.

By order dated June 12, 1974, the Commission directed that the matter be handled under the modified procedure. On November 4, 1974, the proceeding was assigned to an Administrative Law Judge for an initial decision. An initial decision was rendered on December 12, 1974. Exceptions to the initial decision were filed by petitioner and by a respondent, Southern Motor Carriers Rate Conference, Inc., to which replies were filed by various parties.

Review Board No. 4, in a report and order on exceptions dated July 3, 1975, reached a different conclusion from that recommended in the initial decision. Petitions for reconsideration were filed by the petitioner, by an intervener in support of petitioner Shippers National Freight Claim Council and by respondents Freight Forwarders Conference, National Freight Claim Council of American Trucking Associations, Inc., National Motor Freight Traffic Association, Inc., Middlewest Motor Freight Bureau, Rocky Mountain Motor Tariff Bureau, Inc., and Southern Motor Carriers Rate Conference, Inc. Replies were filed by the petitioner and by certain respondents.

POSITIONS OF THE PARTIES

The petitioner has 128 members. Its membership includes a majority of the manufacturers of drugs, medicines, and toilet preparations in the United States, which represents most of the tonnage shipped by that industry. Much of this traffic moves via motor common carriage at ratings subject to released valuation liability pursuant to Release Rates Order No. MC-342.

As an illustration of the alleged ambiguity, petitioner posed a hypothetical example of a shipment consisting of 200 bottles of drugs. Each bottle weighs 5 pounds and has a value of $10. The bottles are packaged 10 to a case, and they are shipped under a released rate provision of 50 cents per pound for each article. Petitioner points out that if five bottles in one case are lost or damaged, three different measures of recovery by shippers are possible under different constructions of the word "article." (1) Carrier A could construe the word "article" to be synonomous with the term "commodity," meaning the entire shipment of 1,000 pounds of drugs. Carrier A then calculates the maximum liability limitation for the shipment as being $500 (50 cents x 1,000 pounds), which is greater than the full value of the bottles involved in the partial loss of $50 ($5 x 10 bottles). As a result, carrier A pays the claim for the full amount of the partial loss of $50. (2) Carrier B construes the word "article" to mean the packaging case, and the liability limitation, therefore, is $25 (50 cents x 50 pounds). Carrier B, accordingly, honors a claim for $25. (3) Carrier C construes the word "article" to mean the smallest unit in the shipment which can be separately identified, the bottle, and calculates the liability limitation to be $2.50 (50 cents x 5 pounds) for each bottle lost. Because five bottles are lost carrier C honors a claim for $12.50.

Petitioner favors the interpretation of carrier A, as set forth in the above hypothetical example, and the respondents support the interpretation of carrier C. No party argued that the interpretation of carrier B is proper.

All parties agree that if a released-rates shipment is totally lost or destroyed, the carrier is liable to the shipper on the basis of the maximum liability limitation for the shipment, which in the above example would amount to $500. The issue posed by petitioner in this proceeding concerns only partial loss or damage to such shipment. Under the interpretation of carrier A, the carrier would be subject to the greatest liability. Under the interpretation of carrier C, the carrier would be subject to the lowest liability.

Respondents argue that "article" as used in the Released Rates Order No. MC-342 means the smallest identifiable unit of a shipment. They submit the testimony of more than 50 members of the National Freight Claim Council of the American Trucking Associations, Inc. These witnesses testify that they have paid claims only on the basis of 50 cents per pound times the weight of identifiable individual units of the commodity shipped which have been lost or damaged and not on the basis of the other suggested alternatives.

Petitioner, to the contrary, submits documentary evidence consisting of claims for damages filed by shippers on either a per-packing-case basis or on the basis of total shipment weight. Furthermore, some of the receipted claims show that they were settled on the latter basis. Five of the carriers against whom such claims were filed are respondents in this proceeding. Specifically:

> *Dow Chemical Company* submitted three claim statements. All three claims were filed on released valuation based on the total shipment weight. The first claim, dated June 28, 1974, was made to Holland Motor Express, Inc., on a shipment from Fort Wayne, Ind. to Louisville, Ky., consigned to Gould, Inc.
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> The second claim, dated August 23, 1974, was made to A.P.A. Transport on a shipment from Englewood to Rahway, N.J., consigned to James Wholesale Drug Co.
>
> The third claim, dated July 15, 1974, was made to Georgia Highway Express, Inc., on a shipment from Norcross, Ga. to Jacksonville, Fla., consigned to Lawrence Pharmacy.
>
> *Merrill-National Laboratories* submitted a claim dated February 14, 1974, to Central Freight Lines on a shipment from Dallas to Victoria, Tex., consigned to Wearden Co. Its claim was filed on a released valuation based on the packing case weight. A copy of a certified check in payment of the claim was also submitted.
>
> *Pfizer, Inc.*, submitted a claim statement dated March 19, 1973, to Briggs Transportation Co. on a shipment from Chicago, Ill., to Janesville, Wis., consigned to Elain Supply Co. Its claim was filed on a released valuation based on the packing case weight.

Whitehall Laboratories, division of American Home Products Corporation, submitted a claim statement to Graves Truck Line dated June 6, 1974, on a shipment from Lenexa, Kans., to Pratt, Kans., consigned to Gibson Products. Its claim was filed on released valuation based on the shipment weight. A remittance voucher in satisfaction of the claim is also submitted. Furthermore, Whitehall asserts that it filed its claims based on the shipment weight with a number of other carriers, including Southwestern Transportation Co., Associated Transport, Inc., Merchants Fast Motor Lines, Mussbaum Trucking, Inc., and Gateway Transportation Co., Inc.

The petitioner argues that to properly interpret the word "article" it is necessary to refer to the released-rates application, the released-rates order entered pursuant to the application, and the National Motor Freight Classification. According to petitioner, in all three of these documents, the word "article" is used synonymously with the word "commodity." In the first four pages of the carriers' original Released Rates Application No. MC-525, commodities were listed under the heading of "articles" for which released ratings and limited liability were sought. Included in that list were "Drugs," "Toliet Preparations," and a number of other commodities. Immediately under the articles list appeared the precise wording here under consideration:

> The agreed or declared value of the property is hereby specifically stated by the shipper to be not exceeding 50 cents per pound for each article.

Moreover, the resulting Released Rates Order No. MC-342 authorizes the establishment of released ratings on the "articles described in the said application"; refers also to "drugs, medicines, toilet preparations and other articles described in the Released Rates Application No. MC-525"; and states that "the commodity description may not be broadened to embrace other commodities or articles *** without specific authority of the Commission." In the ratings published in the National Motor Freight Classification pursuant to this application and order, drugs, chemicals, medicines, toilet preparations, and other commodities are listed under the heading of "Articles."

Petitioner states that limitations of liability in connection with released rates are authorized to protect a carrier from catastrophic loss, setting a maximum limit on any possible loss. Limited liability is authorized by the Commission as an exception to the full liability of common carriers, and such exceptions to an otherwise broad rule of absolute liability must be strictly construed against the carriers.

In support of their position, respondents state that until about a year ago most shippers either initially submitted their claims based upon multiplication of the weight of goods actually lost or damaged by 50 cents per pound or would voluntarily agree to amend their claims to that basis. Respondents believe that a carrier reduces its rates per pound in exchange for a reduced liability per pound or on the basis of a *quid pro quo*.

Respondents read the released-rates application as clearly stating the carriers' liability on a per-pound basis and claim that petitioner's interpretation could lead to unjust discrimination because partial loss or damage to a small shipment could conceivably result in a different amount of recovery as the same partial loss or damage in a large shipment, when the maximum liability limitation varies with the size of the shipment. According to respondents, it is a judicially recognized principle that the declared valuation, when a partial loss is involved, fixes a ratio per pound times the weight of the individual unit or units of the commodity which are actually lost or damaged and is not based on the full value of the partial loss or damage up to the maximum limit of liability for the entire shipment. *Metals or Metal Alloys*, 311 I.C.C. 617, 621 (1960); *Goldstein & Leavy, Inc., v. Arrow Carrier Corp.*, 53 M.C.C. 9, 14 (1951); *Adeline Apparel Shops, Inc., v. Savage Truck Lines, Inc.*, 63 M.C.C. 369 (1955); *Western Transit Co. v. Leslie and Co.*, 242 U.S. 448 (1917); *White v. Southern Ry. Co.*, 38 S.E. 2d 111 (S.C. 1946).

Respondents do concede that certain released-rates orders have authorized recovery on the basis of the full value of the partial loss or damage up to the maximum limit of liability for the entire shipment. However, they note that such a basis is always reflected in an express provision in such orders.[1]

INITIAL DECISION AND EXCEPTIONS

The Administrative Law Judge concluded in his initial decision that the limitation of liability under consideration applies to each and every portion of the shipment moving under the released rates published in compliance with Released Rates Order No. MC-342. He stated:

> For drugs, this means that computation of damages is made on the smallest unit, that is, on the number of bottles lost, damaged, or destroyed. This is the traditional

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[1] This situation is reflected in the former tariffs of Railway Express Co.:

> "Based upon property declared to be of, or released to, a value not exceeding $50.00 for any shipment of 100 pounds or less ***"

and in the tariffs of United Parcel Service:

> "Released to a value not exceeding $100 per package or article not enclosed in a package."

> application of the principle approved by the United States Supreme Court that the declared valuation fixes not an arbitrary limit of recovery but a ratio when partial loss is involved. *Western Transit Co. v. Leslie and Co.* 242 U.S. 448 (1917). This means that recovery follows the method used for Carrier C in petitioner's illustration. Compensation for loss must be computed by multiplying the weight of goods actually lost or damaged by 50 cents per pound. *** See *Metal or Metal Alloys*, 311 I.C.C. 617 (1960); *Goldstein & Leavy, Inc. v. Arrow Carrier Corp.*, 53 M.C.C. 9 (1951); and *Adeline Apparel Shops, Inc. v. Savage Truck Lines, Inc.*, 63 M.C.C. 369 (1955).

Thereafter, exceptions[2] were filed to the initial decision by petitioner Drug and Toilet Preparation Traffic Conference. Petitioner alleged that the Administrative Law Judge made certain errors of law and of fact in deciding that the proper method for determining damages in petitioner's hypothetical example was the method used by carrier C and therefore construing "per article" as meaning the smallest unit which can be identified in a shipment. Petitioner contended that the Administrative Law Judge erred in relying primarily on the *Western Transit* case, *supra*, which was based on a liability limitation of "per net ton." Because of the difference in terminology, petitioner alleged that the limitation under consideration in *Western Transit* had a different meaning than the liability limitation here under consideration of "per pound for each article."

According to petitioner, the Administrative Law Judge also erred by considering out of context the liability limitation authorized by Released Rates Order No. MC-342 and published in the National Motor Freight Classification, which were based on Released Rates Application No. MC-525. The plain meaning of the words "article" and "articles" in the application is said to be the commodity description of the commodities listed therein. In support, petitioner further argues that:

> *** a valuation limitation can be set alternatively on any of these three bases, so long as the wording so states:
>
> 1. Per pound, or
> 2. Per pound at the weight of each case or other shipping container, or
> 3. Per pound at the weight of the released valuation commodity in the shipment (usually the same as the shipment weight).

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[2] Intervener Southern Motor Carriers Rate Conference, on behalf of respondents, filed exceptions requesting modification of the first two paragraphs of the "Findings and Order" section of the initial decision, alleging that it contained an inadvertent error inaccurately reflecting the conclusion clearly intended by the Administrative Law Judge. The review board found that this exception was not germane because the board was not adopting the Administrative Law Judge's findings. For the same reason, on petition, it will not be further considered.

> The significance of this is that the use of the words "per pound" in a liability limitation clause by no means foreordains the meaning of the entire clause. All the words must be considered in interpreting the clause. Otherwise, clauses such as: "50 cents per pound per case"; "50 cents per pound per shipment"; and "50 cents per pound per article", would all mean the same things as merely "50 cents per lb." * * *

Moreover, petitioner contended that if the liability limitation in question had been "per pound for each shipment" instead of "per pound for each article," the Administrative Law Judge would have recognized a factual distinction and not selected carrier C's method of computing liability as correct. However, according to petitioner, it was impractical to use the wording "for each shipment" in connection with these commodities for certain reasons:

> * * * (1) a released rated commodity is often shipped as part of a mixed shipment with other non-released commodities, so it is only proper to make the limitation on the basis of the weight of the released article (commodity), since applying the weight of the entire shipment would expand the carrier's liability improperly; and (2) where several released rated articles are shipped together in one shipment there is set a maximum limitation of "50 cents per pound for each article", rather than expanding the carrier's liability for partial loss to the entire weight of all articles in the shipment.

Finally, according to petitioner, the Administrative Law Judge failed to realize that there was in fact no actual rate reduction involved in this matter, apparently relying on respondent-carriers' recurrent claim that the liability limitation must be computed on a pro rata basis because the rate reduction given shippers applied to each pound of freight. Petitioner stated that:

> The other point is the recurrent use of the word "rate concession", in the sense that the shipper using released rates has received such a boon in the form of lower (than full valuation) rates that he must be nailed to the wall with the most minimal recovery if the carrier loses or destroys his property. To begin with, there never was any rate reduction here. These commodities, prior to the released rates order, had moved at the same classification as now, but at full valuation. At that time, the carriers were considering increasing the classification of drugs, medicines, and toilet preparations and the shippers agreed to this released rates provision to avoid paying higher rates * * *[1] [Footnote added.]

REVIEW BOARD REPORT AND PETITIONS FOR RECONSIDERATION

In its decision on exceptions Review Board No. 4 concluded that "article" means the case, container, or package. The review board stated:

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[1] Apparently, some drugs and related articles were classified at full value ratings as class 70, less than truckload, and class 40, truckload, prior to the effective date of the released ratings on November 13, 1952. However, generally drugs and related articles were, prior to that date, rated at class 85, less-than-truckload, and class 50, truckload.

> We find the phrase "for each article", as used in the National Motor Freight Classification and published pursuant to the authority granted in Released Rates Order No. MC-342 permits recovery for loss or damage of commodities moved under ratings published pursuant to that order for the actual value up to, but no more than, the released value per pound multiplied by the weight of the container or case; that it does not permit recovery for the actual value up to, but no more than, the released value per pound multiplied by the weight of the entire shipment; and that it is not restricted to the actual value up to, but no more than, the released value per pound multiplied by the weight of the individual units of the commodity lost or damaged.

The review board recognized that, in common usage, "article" is applied to almost every substance or material, whether as a member of a class (generic context) or as a particular substance or commodity and that the Commission has used the word with both meanings in the same proceeding. The review board concluded that consideration of the particular context of the released rates application and order was necessary to interpret accurately the particular meaning of the tariff in dispute. The review board's ultimate conclusion that "article" means the package, case, or container rested primarily on *Carter* v. *Wilmington & W.R. Co.*, 36 S.E. 14, 15 (1900), and the Commission's "Summary of Information for Shippers of Household Goods," Form BOp-103, 49 CFR §1003.1. In *Carter*, the supreme court of North Carolina applied the usual and primary meaning of the word "article" and found that each head in a shipment of cattle was one article for purposes of the State statute there under consideration. On the other hand, the court indicated that each nail in a keg would not be one article but rather that the keg would constitute the article.

In the Commission's household goods' regulations, 49 CFR § 1003.1, at pages 20-21, upon which the review board also relied, it is stated:

> 1. Protections up to, but not exceeding, 60 cents per pound per article, at no extra cost. *** If you release your goods on this basis of limited liability, your recovery for any loss or damage will be subject to a maximum of 60 cents times the weight of the article involved. As an example, you may have a used lamp weighing 4 pounds with a current value of $8, purchased 1 year ago for $10. If this lamp is not packed in a container and it is lost or damaged, the mover's liability is limited to $2.40 or 60 cents per pound times 4 pounds. However, if the same lamp is packed in a container, either alone or with a number of other items, the mover's liability is limited to 60 cents per pound times the weight of the container and its contents. Thus, if the total weight of the full containers is 50 pounds, the mover's maximum liability for the contents of the container is $30 (60 cents times 50 pounds). The mover will pay a claim for the full current value of the lamp, $8, if that is all that is lost or destroyed. If the entire container is lost, the mover's maximum liability is $30.

Petitioner and respondents filed petitions for reconsideration of Review Board Number 4's decision, generally reiterating their positions in their opening statements and exceptions.

In addition, respondents assert that the Board erred in concluding that the interpretation of the word "article" in the *Carter* case is in any way inconsistent with a conclusion that the article in the hypothetical example is the bottle. However, respondent's argue that the *Carter* case is of little or no precedential value, because it was based on a State statute. Neither do they believe that the review board's reliance on household regulations are determinative, because household goods movements are made at released valuation in the first instance and are then subject to premium charges for any extra value which might be asserted. The shipments in question, according to respondents, move at full, actual value under the normal tariff rates, with the shipper being given an alternative of agreeing to a released valuation and receiving a lower rate. In the case of household goods, carriers perform the packing and crating, whereas the motor carriers of general commodities have no control over the packaging of the shipments or composition of individual cases.

Petitioner agrees that the *Carter* case and Commission's decisions or regulations concerning household goods are not determinative of this proceeding.

Both parties note that, in the household goods context, the Commission has in its formal decisions and in its regulations treated "articles" as the generic commodity description in some instances and as the individual unit of the shipment in other instances and that the review board recognized this fact.

Discussion and Conclusions

An interpretation of the phrase "for each article" is essential to a determination of the carriers' liability for loss and damage to shipments moving under the released-rates provision for drugs and related articles. As set forth in the examples presented by petitioner, several meanings may be given to the word "article," each of which can muster some support from precedent, but none of which is conclusively applicable to the released rates item in controversy here. Accordingly, we will adopt a meaning for the word "article" which best comports with the history and purpose of released rates.

> That a common carrier cannot exempt himself from liability for his own negligence or that of his servants is elementary. *** The rule of the common law did not limit his liability to loss and damage due to his own negligence, or that of his servants. That rule went beyond this and he was liable for any loss or damage which resulted from human agency, or any cause not the act of God or the public enemy. But the rigor of this liability might be modified through any fair, reasonable and just agreement which did not include exemption against the negligence of the carrier or his servants. The inherent right to receive a compensation commensurate with the risk involved the right to protect himself from fraud and imposition by reasonable rules and regulations, and the right to agree upon a rate proportionate to the value of the property transported. *Adams Express Co.* v. *Croninger*, 226 U.S. 491, 509 (1913).

These common law rights, as interpreted by the courts, were codified as section 20(11) of the act, 49 U.S.C. 20(11), made applicable to motor carriers by section 219 of the act, 49 U.S.C. 319.

The valuation of the property transported is not meant to set an absolute limit of liability but rather a ratio of loss to recovery by the shipper. *Western Transit Co.* v. *Leslie & Co., supra*, at 454. If "article" were defined to mean the entire shipment, the released valuation would set only a maximum limit of liability; a shipper would recoup full value for all loss up to the maximum limit. This result is clearly at odds with the *Western Transit* case, *supra.*

"The purpose of the Act to prevent discrimination has been emphasized by [the Supreme Court] and is well known." *Chicago & N. W. Ry.* v. *Lindell*, 281 U.S. 14, 16 (1930). Discrimination in the form of disparate payments to shippers for loss and damage has been long recognized and is equally repugnant to the act as discriminatory charges in the first instance. *Id.* at 17-18. An interpretation of "article" to mean other than the smallest identifiable unit in a shipment, as contended by respondents, would give rise to the possibility of discrimination.

Suppose shipper A has a mixed shipment of drugs ranging in value from $1 per bottle to $50 per bottle. The hypothetical shipment consists of 5 cases, weighing 100 pounds each. Shipper B also has a mixed shipment of drugs ranging in value from $1 per bottle to $50 per bottle, except that shipper B's shipment consists of 10 cases of 50 pounds each. Suppose further that each shipment is moved subject to a liability limitation of 50 cents per pound for each article.

If a $50 bottle is damaged in each shipment, compensation to shipper A would be different from shipper B if liability is determined on a packing case basis. Shipper A would recover the full value of his loss (50 cents/pound x 100 pounds = $50), while shipper B would recover only one-half of his loss (50 cents/pound x 50 pounds = $25). The only way to remedy this potential disparity is to define "article" to mean the smallest identifiable unit in a shipment.

We remind all parties that our decision is strictly limited to defining the phrase "for each article" in connection with the publication of released ratings on drugs and related commodities, pursuant to authority granted in Released Rates Order No. MC-342. Further, we admonish respondents to take greater care to use unambiguous terms in released-rates tariffs in the future.

We find that the term "article" in the phrase "not exceeding 50 cents per pound for each article" means the smallest identifiable unit in a shipment of drugs or related articles.

We further find that this decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

COMMISSIONER HARDIN dissents.

It is ordered, That this proceeding be, and it is hereby, discontinued.

No. 36139

THE BOARD OF TRADE OF KANSAS CITY, MISSOURI, INC. v. BURLINGTON NORTHERN, INC., ET AL.

Decided November 30, 1976

Tariff rules of certain defendants governing absorption of connecting-line switching charges affecting named consignees found to be discriminatory. Defendants ordered to cease and desist from maintaining unlawful tariff provisions. In all other respects, complaint dismissed.

Phil M. Cartmell, Jr., and *Jon C. Hansen* for complainant.

Peter W. Hohenhaus, Robert B. Batchelder, William P. Higgins, J. J. Nagle, Foster Mattson, and *Donald McDevitt* for defendants.

REPORT AND ORDER OF THE COMMISSION

DIVISION 2, COMMISSIONERS HARDIN, O'NEAL, AND CHRISTIAN

BY THE DIVISION:

Exceptions to the initial decision of the Administrative Law Judge were filed by complainant, The Board of Trade of Kansas City, Missouri, Inc. (Board of Trade.) Defendants, Chicago, Rock Island and Pacific Railroad Company (Rock Island), Chicago and North Western Transportation Company (CNW), Chicago, Milwaukee, St. Paul and Pacific Railroad Company (Milwaukee), and Union Pacific Railroad Company (UP), jointly filed a reply.[1] Our conclusions differ in part from those of the Administrative Law Judge. Exceptions and requested findings not specifically discussed in this report nor reflected in our findings or conclusions have been considered and found not justified or their resolution unnecessary for the proper disposition of the proceeding.

By complaint filed January 29, 1975, the Board of Trade alleges that defendants' rules and practices governing absorption of inbound switching charges at Topeka, Salina, Wichita, and Hutchinson,

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[1] Other defendants are: Burlington Northern, Inc. (BN), The Kansas City Southern Railway Company (KCS), Norfolk and Western Railway Company (N&W), The Atchison, Topeka and Santa Fe Railway Company, Illinois Central Gulf Railroad Company, Missouri-Kansas-Texas Railroad Company (MKT), Missouri Pacific Railroad Company (MP), and the St. Louis-San Francisco Railway Company (Frisco).

Kans., and Lincoln, Nebr., on grain and grain products, and the nonabsorption of inbound connecting-line switching charges at Kansas City, Mo.-Kans., on the same commodities, are unlawful under sections 1, 2, 3, and 4 of the Interstate Commerce Act. An oral hearing was held and briefs were filed by complainants and four defendants.

Complainant provides facilities and services to its 14 member elevators[2] for the buying, selling, and trading of grain and grain products. A large volume of grain moves from western origins to Kansas City, where it is milled or stored in transit, primarily for reshipment to the gulf ports for export. Complainant alleges that it competes for this traffic with the five interior market points of Topeka, Salina, Wichita, Hutchinson, and Lincoln. The through rates from specified origins via these interior points to similar destinations are the same as the combination rates consisting of a flat rate from the same origins to Kansas City and an additional proportional rate beyond Kansas City to the same destinations. The only difference in transportation conditions or charges, complainant alleges, is that the defendants absorb the inbound switching charges at the five interior points but not at Kansas City.

Switching charges range from $16.56 to about $31.74 at Kansas City. Complainant argues that its members are injured because these charges are not absorbed. Although charges are normally refunded by defendants, the refunds never catch up with assessments. Therefore, over $200,000 owing to complainant's members is constantly tied up in outstanding claims for refunds (see appendix A). Complainant contends that much of this amount represents capital borrowed by its members at high interest rates, and that additional clerical and administrative expesnes are incurred in applying for the refunds from the outbound rail carriers. Continental Grain states that it pays $4,380 in interest a year on the inbound switching charges plus recordkeeping expenses. Kansas City Terminal Elevator Co. states that, in addition to interest on the charges, it costs approximately $280 a month for computer processing and $120 a month for auditing expenses. It is complainant's position that these additional charges disadvantage the Kansas City elevators in the highly competitive grain market to the advantage of elevators at the five specified points.

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[2] Complainant's members who are operators of grain elevators include: Kansas City Terminal Elevator Company, Smoot Grain Company, Wolcott and Lincoln, Continental Grain Company, Tabor Milling Company, A.D.M. Milling Company, International Multi-Foods, Ralston Purina, Seaboard Allied Milling Company, General Mills, Far-Mar-Co., Bunge Corporation, Cargill, Inc., and Bartlett Grain Company.

Inbound switching charges on transit shipments at Kansas City are ultimately refunded to the consignees by the outbound railroads under various methods provided in their tariffs. The 90-percent method provides that the switching charge will be refunded if 90 percent of the tonnage shown in the inbound switch bill is surrendered against outbound transit shipments. This type of claim requires verification by the railroads' Western Weighing and Inspection Bureau. The car-for-car method provides that any amount of tonnage from the original inbound freight bill can be surrendered against the outbound car. After certifying on the outbound bill of lading that a request is made to refund switching charges in a stated amount per a specified inbound paid switch bill, the carrier's agent has authority to refund the charges. For grain not transited at Kansas City, the freight bill can be stamped "Not Good for Transit," and if a switching charge has been made it will be refunded, or if it has not been paid it will be absorbed.

Complainant shows that there is an average delay of 49 days from the time the claim is filed until the claim is paid, although it is not clear which of the recovery methods is being used (appendix B). While a rail agent at Kansas City has the authority under the tariff to refund the charges directly, only two defendants do so in actual practice. The rest require that refunds be made from their main offices, which contributes to the delay.

The KCS, MKT, and Frisco absorb the inbound switching charges of MP to specified consignees. Thus the KCS will absorb the switching charges on grain consigned to Purina Mills; MKT will absorb charges when consigned to Checkerboard Elevator or Purina Mills; and the Frisco absorbs charges when the consignee is Checkerboard or Purina. Complainant alleges that this results in undue prejudice and discrimination against its members which do not have their switching charges absorbed and also violates sections 1(4), 1(5), and 1(6) of the act.

The Board of Trade also alleges that the absorption of switching charges on shipments of grain from more distant points but not from intermediate stations violates the long-and-short-haul clause of section 4 and is a source of undue preference and prejudice. Rates from specified noncompetitive and competitive points are the same; however, the switching charges from the more distant competitive points are absorbed, while the switching charges on the same commodities from the directly intermediate but noncompetitive points are not absorbed. For example, BN, MP, Rock Island, and UP absorb switching charges on grain from Lincoln, Nebr., to Kansas

City, but not from intermediate noncompetitive stations taking the same rate as Lincoln: Hickman (BN), Elmwood (MP), Martell (Rock Island), and Cortland, Nebr. (UP). In addition, defendants sometimes absorb switching charges on grain from more distant noncompetitive stations but not from intermediate competitive stations. Thus on shipments from the noncompetitive station, Valley, Nebr., to Kansas City switching charges are absorbed, whereas such charges are not absorbed from Wahoo, Nebr., a competitive station directly intermediate thereto, the rate being 41 cents from both points to Kansas City over UP.

Complainant maintains that the switching charges are unreasonable. The charges, it is argued, are not justified by revenue considerations since they are ultimately refunded to the consignees. Absorption of charges at the five interior points but not at Kansas City is also given as evidence of unreasonableness, as is the fact that inbound switching charges are absorbed at Kansas City on other freight or on the same commodities from specified origins.

Defendants' principal contention is that their absorption practices are justified by different transportation conditions. They agree that Topeka and Salina compete with Kansas City for storage of grain; however, transit is generally performed by the same railroad providing the inbound and outbound line-haul movements. When this occurs, the railroads are more able financially to absorb the added switching costs incurred. Thus at the five interior points the shipper pays on the inbound shipment to the transit point the same rate that is applicable on traffic terminating at that point and not registered for transit; when the shipment is made from the transit point to destination the shipper pays only the balance of the single-factor through rate. Kansas City, however, is a major rail interchange and rate-break point. It is served by 12 railroads,[3] as compared to only 4 serving the interior points. Consequently, instead of a single-factor through rate being available in connection with transit at Kansas City, it is necessary to apply on the outbound shipment a proportional rate. Therefore, the inbound carrier is less likely to receive the outbound movement, which produces greater revenue. In these circumstances the inbound carrier does not absorb switching charges to a grain elevator which it does not serve. Instead, the railroad holds out to refund switching charges if it participates in a matching outbound haul. The administrative burdens and expenses which the consignees incur at Kansas City are necessary to protect the through rate. The rules providing for nonabsorption of switching charges at Kansas City and for the refund through claim channels have been in effect for 40 years or more, and similar rules are also in effect at other Missouri River rate-break markets such as Atchison, Kans., St. Joseph, Mo., Sioux City and Council Bluffs, Iowa, and Omaha and South Omaha, Nebr.

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[3] The CNW, Milwaukee, and N&W do not run south, and the UP does not go east or south of Kansas City. The KCS which would bring grain north to Kansas City does not go further north of that point.

Defendants also point out that Kansas City has certain other advantages which further distinguish it from the interior points. It has more rail service and equipment, it has barge transportation available, a larger volume of grain moves through Kansas City, and it has a grain exchange, greater transit facilities, and broader sales markets.

Since the switching charges are refunded by the outgoing railroad, defendants contend that no rate disparity or injury exists to support a finding of undue preference and prejudice. Compliance with the refund requirements is a mere inconvenience to complainant's members; their business volume is such that interest payments and administrative expenses are de minimus. Kansas City Terminal Elevator alone has gross revenues of over $25 million a year. In addition, defendants believe that delays in the refund procedure could be mitigated if the consignees increased their use of the car-for-car method. Consignees could submit refund claims immediately rather than accumulating them for periodic filing. Defendants also contend that the involved rules and practices have not adversely affected the movement of grain through Kansas City or caused any benefit to the five interior points. Finally, defendants argue that complainant's allegations of unreasonableness are based on the discredited theory of relative unreasonableness, and that no cost or other evidence was presented to show that switching charges are unreasonable.

The Administrative Law Judge found that the tariff provisions are discriminatory, unduly preferential, and otherwise unlawful to the extent that (1) the tariffs provide for the absorption of switching charges on inbound grain for transit at Kansas City with origins at noncompetitive interior points, and nonabsorption of like charges on grain from other points which are georgraphically intermediate and closer in distance to Kansas City; and (2) the tariffs provide for the absorption of switching charges on inbound grain shipments only to certain consignees in Kansas City.

In its exceptions the Board of Trade continues to maintain that the nonabsorption of switching charges by defendants at Kansas City and the absorption of such charges at competitive market points of Topeka, Salina, Wichita, Hutchinson, and Lincoln is a source of prejudice to complainant's members and preference to the latter points and is unreasonable.

DISCUSSION AND CONCLUSIONS

Section 3 of the act prohibits undue or unreasonable preference or prejudice in any respect whatsoever. In order to warrant a finding of undue preference and prejudice the evidence should disclose (1) a disparity in defendants' rates, rules, or practices in favor of the preferred points, (2) that defendants are the common source of the disparity, (3) that complainant is competitively injured, actually or potentially, and (4) that the disparity is not justified by differences in transportation conditions. Complainant has the burden of proving the first three factors and defendants have the burden of justifying the disparity, if possible, in connection with the fourth factor.

Defendants absorb switching charges at the competitive inland market points of Topeka, Salina, Wichita, Hutchinson, and Lincoln whereas such charges are not absorbed at Kansas City, although they are normally refunded to the Kansas City consignees. The issue presented by this complaint is not whether there is an unjustified disparity in freight charges as such, but whether the refund procedures prejudice Kansas City consignees by creating interest charges and administrative expenses in the collection of the refunds, thereby benefiting the interior points.

Subsequent to the filing of this complaint, the Milwaukee Road amended its tariff so as to provide that it will not refund switching charges at Kansas City when it participates in outbound movements. The Board of Trade submits that the initial decision does not take this into consideration. Since the amendment was effected after the complaint was filed, there is no proper joinder of issues regarding Milwaukee's no-refund amendment and the lawfulness or unlawfulness of the Milwaukee amendment is irrelevant to our disposition of this complaint.

There is no dispute concerning the existence of common control by defendant railroads, and we find that there is common control. Complainant has shown that it competes with the five interior points as a transit point for the storage of grain. It has also shown that its members incur interest and administrative expenses in applying for the refunds, which consignees or shippers at the five interior markets do not incur, although there is some indication that paperwork is involved in qualifying the shipments for transit rates at the interior points. However, preference and prejudice are not prohibited unless they are undue; and, to be undue, they must be shown to be a source of positive advantage to the parties or traffic alleged to be favored, and a positive detriment to the other party or traffic.

Complainant failed to show that the administrative and interest expenses attributable to the refund rules are so substantial as to preclude its members from competing with the interior market points for the involved traffic, or that these expenses have discouraged the movement of grain through Kansas City during the 40 years that the basic tariff provisions concerning nonabsorption have remained in effect. Nor has the Board of Trade shown that its members will not be on a fair competitive basis in bidding for grain in the future or that the interior points and elevators have been advantaged in this respect. Accordingly we are not persuaded that defendants' tariff rules and practices governing the nonabsorption and refund of connecting-line switching charges at Kansas City on inbound transit grain and grain products are prejudicial to complainant or its members or preferential to Topeka, Salina, Wichita, Hutchinson, or Lincoln.

The Board of Trade believes that the absorption of such charges at Topeka, Salina, Wichita, Hutchinson, and Lincoln is in itself strong evidence of the unreasonableness of nonabsorption at Kansas City, citing *Minneapolis Traffic Assn.* v. *Chicago & N. W. Ry. Co.*, 245 I.C.C. 11, 16 (1941). Complainant does not contend that the switching charges are intrinsically unreasonable but that nonabsorption at Kansas City is unreasonable in relation to absorption of such charges at the compared points. Since our decision in *Southern Wyoming Coal Operators Assn.* v. *C., B. & Q. R. Co.*, 264 I.C.C. 593 (1946), we have consistently held that the theory of relative unreasonableness cannot be considered under section 1; questions of this sort must be decided under sections 2 or 3. The issue for our consideration under section 1 is whether rates or charges are unreasonable because they are too high for the service rendered, and complainant has offered no evidence on this question.

KCS, Frisco, and MKT absorb inbound switching charges of the MP for consignees Checkerboard Elevator and Purina Mills but not for other Kansas City consignees. The transportation services are like, contemporaneous, and performed under substantially similar circumstances. Defendants offer no justification for this different treatment of Kansas City consignees, and we conclude that this practice is unjustly discriminatory.

Complainant has shown that defendants generally absorb connecting-line switching charges at Kansas City on competitive traffic which originates at points served by more than one railroad, while such charges are not absorbed when the grain originates at intermediate stations served by one line. This is done under relief granted by Fourth Section Order No. 5. Complainant has also shown that in some instances defendants absorb switching charges on shipments from more distant noncompetitive origins. However, complainant failed to show the through rates and total aggregate transportation charges from the various origin and intermediate points to ultimate destinations over the rate-break point of Kansas City, and the Administrative Law Judge therefore concluded that complainant had failed to establish any unlawfulness pursuant to the long-and-short-haul clause of section 4. The Board of Trade takes no exception and we affirm and adopt the Administrative Law Judge's findings and conclusions in this respect.

However, the Administrative Law Judge also found that defendants' tariffs were discriminatory, unduly preferential, and otherwise unlawful insofar as they provide for absorption of switching charges on shipments from noncompetitive origins and nonabsorption of like charges on shipments from other points which are intermediate to Kansas City and similarly situated. The Board of Trade takes exception, maintaining that it is the nonabsorption (and not the absorption) of switching charges which is unlawful.

Complainant has shown that defendants favor certain origins for absorption of connecting-line switching charges at Kansas City, while such charges are not absorbed (but are refunded) on shipments from other intermediate origins taking the same rate to Kansas City. However, the record discloses no evidence of competitive injury to complainant or its members sufficient to support a finding of undue preference and prejudice. Nor is there any evidence of unjust discrimination against or among the Kansas City consignees. All consignees in Kansas City are treated the same in this respect; the switching charges are either uniformly absorbed or they are assessed and refunded, depending on the origin of shipment. Accordingly, we find that complainant has failed to establish that absorption of connecting-line switching charges at Kansas City on shipments of grain from more distant origins or the nonabsorption of like charges on shipments from intermediate points are unlawful.

ULTIMATE CONCLUSIONS AND FINDINGS

We find that the tariff provisions of Missouri-Kansas-Texas Railroad Company, the Kansas City Southern Railway Company, and the St. Louis-San Francisco Railway Company for the absorption of inbound switching charges of the Missouri Pacific Railroad Company on grain and grain products consigned to Purina Mills and Checkerboard Elevator at Kansas City, Mo.-Kans., but not to other Kansas City consignees are unjustly discriminatory in contravention of the provisions of section 2 of the Interstate Commerce Act.

We find that defendants' tariffs governing absorption of switching charges at Topeka, Salina, Wichita, and Hutchinson, Kans., and Lincoln, Nebr., and nonabsorption of connecting-line switching charges on inbound grain and grain products for transit at Kansas City are not shown to be unjust and unreasonable, unjustly discriminatory, unduly preferential or prejudicial, or otherwise unlawful.

We find that defendants' tariffs providing for absorption of connecting-line switching charges at Kansas City on shipments of grain and grain products which originate at more distant points, and nonabsorption of like charges on shipments from intermediate origins, are not shown to be unjust and unreasonable, unjustly discriminatory, unduly preferential and prejudicial, or otherwise unlawful.

We further find that this decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

It is ordered, That the defendants herein, to the extent that they participate in the transportation, be, and they are hereby, notified and required to cease and desist, on or before 45 days from the date of service of this report and order, and thereafter to abstain from practicing the unjust discrimination found to exist.

It is further ordered, That said defendants, according as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before 45 days from the date of service of this report and order, upon not less than 30 days' notice to this Commission and to the general public by filing and posting in the manner prescribed under section 6 of the Interstate Commerce Act, and thereafter to maintain and apply, rates, charges, rules, regulations, and practices which will prevent and avoid the unjust discrimination found to exist.

It is further ordered, That this order shall continue in force until further order of the Commission.

And it is further ordered, That, in all other respects, the complaint filed in this proceeding be, and it is hereby, dismissed.

APPENDIX A

Members of the Kansas City Board of Trade estimate the following average balances for inbound switching charges paid and awaiting refund

Members	*Outstanding claims*
Kansas City Terminal Elevator Co	$16,544.04
Smoot Grain Company	34,452.54
Wolcott and Lincoln, Inc	5,586.72
Continental Grain Company	45,000.00
Tabor Milling Company	2,418.24
A.D.M. Milling Company	3,150.00
International Multi-Foods Corp	2,400.00
Ralston Purina Company	5,399.94
Seaboard Allied Milling Corp	11,089.05
General Mills, Inc	10,000.00
Far-Mar-Co., Inc	25,706.22
Bunge Corp	20,700.00
Cargill, Inc	30,000.00
Bartlett Grain Company	11,450.00
Total average claims outstanding	223,896.75

APPENDIX B

Twelve-month summary of switch claims filed and period required for refund to account of Kansas City Terminal Elevator Company

Defendant railroad	Total claims filed	Average number of days required for refund[1]
Atchison, Topeka & Santa Fe (Santa Fe)	17	29
Burlington Northern (BN)	6	32
Chicago and Northwestern (CNW)	9	80
Chicago, Rock Island and Pacific (see note)	14	133
Illinois Central Gulf (ICG)	3	26
Kansas City Southern (KCS)	14	39
Missouri-Kansas-Texas (MKT)	14	16
Missouri Pacific (MP)	24	52
Norfolk & Western (N&W)	3	105
St. Louis-San Francisco (Frisco)	23	110
Total claims filed	127	
Average period of delay		49

Rounded to nearest fraction of a day

NOTE: None of the claims filed during the period were paid by reason of carrier bankruptcy

No. 34275

THE CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY, ET AL. v. AKRON, CANTON & YOUNGSTOWN RAILROAD COMPANY, ET AL.

Decided December 9, 1976

Found, pursuant to the order of the Commission served June 8, 1976, that Consolidated Rail Corporation is a successor in interest to the various official territory defendants in this proceeding whose operations it has assumed, and that Consolidated Rail Corporation is bound by the decision and order of the Commission entered September 19, 1975, affirmed by order served February 13, 1976.

Phil C. Beverly, Richard A. Hollander, Howard D. Koontz, R. Eden Martin, Theodore N. Miller, George L. Saunders, Jr., James L. Tapley, and *Howard J. Trienens* for complainants.

Andrew C. Armstrong, Edward A. Kaier, Sr., and *Donald M. Tolmie* for official territory defendants.

Richard J. Murphy for Consolidated Rail Corporation.

REPORT AND ORDER OF THE COMMISSION

BY THE COMMISSION:

This proceeding is currently before the Commission as the result of an order served June 8, 1976, by the Commission, in which all parties to the above-entitled proceeding, in addition to the Consolidated Rail Corporation (hereinafter referred to as ConRail), were required to show cause (1) why ConRail should not be considered as a successor in interest to the various official territory defendants whose operations it has assumed, and (2) why ConRail should not be bound by the decision and order of the Commission entered September 19, 1975, affirmed by order served February 13, 1976.

Pursuant to the Commission's show cause order, statements were received on July 8, 1976, from the Cincinnati, New Orleans & Texas

Pacific Railway Company, et al. (complainants), the Akron, Canton & Youngstown Railroad Company, et al. (official territory defendants), and ConRail.

BACKGROUND

This proceeding originally came to the Commission by complaint filed May 25, 1963, in which complainant railroads[1] alleged that the divisional bases observed in dividing joint freight rates applicable to carload and less-than-carload traffic, except coal and coke made from coal, moving between specified border points and stations of defendants'[2] lines in official territory, were excessive, unjust, inequitable, and unduly preferential in contravention of sections 1(4), 3(4), and 15(16) of the Interstate Commerce Act. After much protracted adjudication in this and related proceedings, the Commission entered a decision and order on September 19, 1975, affirming the recommended report and order of the hearing examiner (now Administrative Law Judge), served October 23, 1964, and ordering the complainants and defendants, according as they participate in the transportation in question, to establish and apply divisions of joint all-rail interstate rates for the transportation of property between points named in the complaint and points in official territory as prescribed therein. 351 I.C.C. 769 (1975).

Subsequent to the Commission's decision and order of September 19, 1975, the following orders in docket No. 34275 were served by the Commission: (1) October 30, 1975, fixing the compliance date of the preceding decision and order as 120 days from September 29, 1975; (2) December 19, 1975, postponing the compliance date, and granting an extension until February 26, 1976, to allow thorough consideration of the matters raised in defendants' petition for reconsideration, filed November 17, 1975; (3) February 13, 1976, denying defendants' petition for reconsideration, and fixing the compliance date of the preceding decision and order as 90 days from February

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[1] The Cincinnati, New Orleans & Texas Pacific Railway Company, Illinois Central Railroad Company (now merged into the Illinois Central Gulf Railroad Company), Southern Railway Company, and the Seaboard Air Line Railroad Company (now merged into the Seaboard Coast Line Railroad Company).

[2] The defendants are official territory railroads, and those particularly mentioned in the recommended report and order, served October 23, 1964, were Pennsylvania Railroad Company and New York Central Railroad Company (since merged into Penn Central Transportation Company and currently under bankruptcy reorganization), The Baltimore & Ohio Railroad Company, The Chesapeake and Ohio Railway Company, Chicago & Eastern Illinois Railroad Company, Norfolk and Western Railway, and Richmond, Fredericksburg & Potomac Railroad Company.

13, 1976; (4) May 11, 1976, postponing the compliance date, and granting a 20-day extension from May 11, 1976, to allow thorough consideration of the matters raised in defendants' letter-petition for postponement, filed May 4, 1976, regarding alleged practical problems of compliance if ConRail does not comply with the Commission's decision and order of September 19, 1975; (5) May 28, 1976, postponing the compliance date, and granting an extension until June 10, 1976, by the Commission's own motion; and (6) June 8, 1976, postponing the compliance date until further notice, and issuing of the show cause order which is the subject of this instant proceeding.

ARGUMENT

In response to the Commission's order of June 8, 1976, ConRail contends that it is not a legal successor to any of the defendants in this proceeding, that it is not a party to this proceeding, and that it has never been afforded a hearing in accordance with section 15(6)(a) of the Interstate Commerce Act and the Administrative Procedure Act, 5 U.S.C. § 554. ConRail also contends that even though it adopted all existing rates, routes, and division agreements of those lines which were conveyed to it pursuant to the Final System Plan (established by the Regional Rail Reorganization Act of 1973 (hereinafter referred to as the 3R Act)), the only obligation of ConRail in respect to rates and divisions is set forth in section 301(b) of the 3R Act, which makes ConRail subject to the Interstate Commerce Act. ConRail reasons, therefore, that the absence of any specific statutory provision to make ConRail bound by rate or division orders entered in proceedings held long before ConRail came into existence implies that ConRail is not subject to orders such as the one under consideration in this proceeding.

ConRail argues in support of their position that they are a new railroad by virtue of the 3R Act, and thus are not a legal successor to the bankrupt estates which owned lines of railroads now operated by ConRail. It is further advanced that there is nothing in the 3R Act which suggests an intention that ConRail is bound by obligations or orders which ran against the bankrupt railroads whose properties were acquired by ConRail, and that the provision in section 303(b) of the 3R Act which provides that ConRail acquire "All rail properties *** free and clear of any liens or encumbrances ***" is contrary to any inference that ConRail is a successor in interest to the various bankrupt railroads whose operations it has assumed. ConRail claims, therefore, that since it is not a legal successor to the bankrupt railroads, and the 3R Act does not make ConRail subject to Commission orders which run against those bankrupts, it is unlawful to enforce the order of September 19, 1975, without violating section 15(6)(a) of the Interstate Commerce Act and the hearing requirements of the Administrative Procedure Act.

Finally, ConRail asserts that while it did adopt all presently applicable divisions of its acquired railroads, the public interest does not require ConRail to voluntarily submit to an order which would require a prospective change in its adopted divisional arrangements at an alleged cost to ConRail of approximately $1 million annually.

In opposition to the arguments put forth by ConRail, complainant railroads in this proceeding state that well-settled principles of corporate law confirm the status of ConRail as a successor in interest to the various official territory defendants whose operations it has assumed. Complainants also cite various precedent in asserting that a successor railroad is bound to observe orders having future application entered by the Commission against a predecessor railroad. Moreover, complainants contend that the legislative history of the 3R Act supports the conclusion that no change in existing law as it applied to ConRail was contemplated, and that compelling reasons of public policy also require ConRail to be bound by Commission orders binding upon its predecessors.

Complainants argue in support of their position that the courts have uniformly considered several criteria in determining whether a particular intercorporate transaction is in effect a merger or consolidation, rather than a simple sale of assets, and thus whether the surviving corporation is deemed a successor to the interests of a predecessor corporation. Citing case law,[3] complainants state that the several criteria include whether substantially all of the assets of the predecessor have been transferred to the successor, whether the predecessor has ceased ordinary business operations, and whether those business operations have been continued by the successor.

Complainants assert that the above criteria are applicable to ConRail, and that the transaction under which ConRail succeeded to the estates of the bankrupt defendants satisfies them, insofar as virtually all of the railroad equipment, substantially all of the yards and right of way, and other assets of the bankrupt railroads, both tangible and intangible, were conveyed to ConRail together with a continuity of stock ownership between the bankrupt railroads and ConRail.

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[3] *Knapp* v. *North American Rockwell Corp.*, 506 F. 2d 361, 363-67 (3d Cir. 1974); *Forest Laboratories, Inc.* v. *Pillsbury Co.*, 452 F. 2d 621, 625 (7th Cir. 1971); *Alexander & Baldwin, Inc.* v. *Peat, Marwick, Mitchell & Co.*, 385 F. Supp. 241, 242-43 (S.D.N.Y. 1974); *Lopata* v. *Bemis Co.*, 383 F. Supp. 342 (E.D.Pa. 1974); *Shannon* v. *Samuel Langston Co.*, 379 F. Supp. 797, 800-02 (W.D.Mich. 1974); *Bazan* v. *Kux Machine Co.*, 358 F. Supp. 1250 (E.D.Wis. 1973); *Kloberdanz* v. *Joy Manufacturing Co.*, 288 F. Supp. 817, 821 (D.Colo. 1968).

Complainants further assert that both the Commission and the courts have recognized the principle that a successor railroad is bound to observe prospective orders entered by the Commission against a predecessor railroad. ***Interstate Commerce Commission*** v. *Western N. Y. & P.R. Co.*, 82 Fed. 192 (C.C. W.D. Pa. 1897); *Behlmer* v. *Louisville & N.R. Co.*, 83 Fed. 898 (4th Cir. 1897), *rev'd on other grounds*, 175 U.S. 648 (1900). Additionally, complainants aver that nothing in the legislative history of the 3R Act exempts ConRail from the binding effect of Commission orders upon it as successor in interest to the railroads currently in reorganization.

Finally, complainants state that if ConRail is free to disavow Commission orders binding upon its corporate predecessors, the process of effecting an orderly reorganization of the northeastern railroads will be undermined, and the prospective effects of a Commission order could be evaded by the simple artifice of a corporate reorganization, dissolution, transfer, or other similar arrangement.

In the response submitted by the official territory defendants to the Commission's order of June 8, 1976, the defendant railroads briefly state that since complainant railroads are the parties seeking to impose the enforcement of an order, comment on their part in regard to ConRail's status as a possible successor in interest is neither necessary or appropriate.

DISCUSSION AND CONCLUSIONS

The proceeding currently before the Commission was instituted in response to defendant railroads' letter petition of May 4, 1976, in which defendants state that the potential nonparticipation by ConRail in the territorial divisional basis established by the Commission's decision and order entered September 19, 1975, creates substantial practical problems of compliance such that compliance may be impossible. In an effort to resolve any possible problems of compliance by the defendant railroads, the Commission issued an order served June 8, 1976, requiring designated parties to show cause why ConRail should not be considered a successor in interest to various defendants whose operations it has assumed pursuant to the 3R Act, and why ConRail should not be bound by the Commission's order.

We conclude that ConRail must be considered a successor in interest to its predecessor corporations, and that it is subject to the Commission's orders herein. Pursuant to special legislation, ConRail was created and designated as the legal entity to take over the assets and operations of various bankrupt railroads within the framework of existing law. ConRail stands, therefore as a federally created statutory successor to its predecessor corporations, and thus must be, and is, so considered for purposes of this proceeding. Cf. *In re Associated Gas and Electric Co.*, 71 F. Supp. 538, 540-41 (S.D.N.Y. 1947).

The successor-in-interest doctrine was developed to prevent a corporate entity from avoiding legal obligations through amalgamation, consolidation, merger, or other legal means. Historically, the railroads had a contributing role in the development of the corporate law concept of succession in interest, and a corporate successor was often construed to be a corporation which has become invested with the rights, and has assumed the burdens, of its predecessor corporation. *Schmoele* v. *Atlantic City R. Co.*, 110 N.J. Eq. 597, 600, 160 A. 524, 526 (1932).

By authorization contained in section 302(a) of the 3R Act, ConRail was directed to acquire all rail properties designated in the Final System Plan to be transferred or conveyed to it. As noted by the complainants in this proceeding, such assets included virtually all of the railroad equipment, substantially all of the yards and right of way, and various other assets, both tangible and intangible. Moreover, a substantial continuity of ownership was created, since ConRail's stock is owned by those entitled to payment for the line segments conveyed to it in accordance with section 303(a) of the 3R Act.

We recognize that while the term "successor in interest" ordinarily indicates statutory succession where a corporation changes its name but retains the same property without a change in ownership, *City of New York* v. *Turnpike Development Corp.*, 233 N.Y.S. 2d 887, 890 (1962), the total circumstances surrounding the creation, obligations, and duties of ConRail support the conclusion that ConRail is a legal successor in interest to the bankrupt defendant railroads in this proceeding.

Additionally, ConRail has by its own admission adopted, with one exception,[4] all existing rates, routes, and division agreements of the railroads whose operations it has assumed. As stated in an amendment to ConRail's Application for Special Permission No. 1, filed with the Commission on December 17, 1975 (docket No. 76-2700):

> ConRail will adopt all existing joint rates, routes and divisions which are presently applicable from, to or via the lines of railroads which are to be conveyed to its pursuant to the Regional Reorganization Act of 1973 *** except for the rates and routes with LIRR. Amendment to Application, p. 2, filed February 5, 1976.

Accordingly, it would appear that ConRail concedes the Commission's jurisdiction over rates adopted from predecessor railroads, a position we do not believe to be consistent with its contention in this proceeding that it is not subject to the orders in question.

We further conclude that as a successor railroad to the bankrupt defendant railroads in this proceeding, ConRail must also be bound by the decision and order of the Commission entered September 19, 1975, affirmed February 13, 1976. Although the defendant railroads became bankrupt after this original proceeding was commenced, and ConRail succeeded to the properties of the bankrupt defendants between the time the decision and order of the Commission became final and the compliance date, ConRail is nonetheless bound by the decision and order in this proceeding.

A threshold question of whether the Interstate Commerce Commission has jurisdiction to enter an order against the bankrupt defendant railroads has long been resolved in favor of the Commission. *Glens Falls Portland Cement Co.* v. *Delaware & Hudson Co.*, 66 F. 2d 490 (2d Cir. 1933), *cert. denied*, 290 U.S. 697 (1933). Since the final order of February 13, 1976, was entered against the defendant railroads prior to the conveyance of their property to ConRail on April 1, 1976, the Commission was clearly within its jurisdiction when it entered the order against the defendant railroads in this proceeding.

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[4] ConRail did not adopt trailer-on-flatcar (TOFC) rates to or from 31 designated TOFC terminals formerly operated by the Penn Central Transportation Company, the Erie Lackawanna Railroad Company, the Reading Railway System, and the Lehigh Valley Railroad. As noted in the Commission decision in that proceeding, *Cancellation of TOFC Service, Consolidated Rail Corporation*, 355 I.C.C. 26, 28, "Although it previously had contended that this Commission lacked statutory jurisdiction to suspend or adjudicate the proposed changes in TOFC services, as provided in its Tariff No. 1, ConRail on brief specifically concedes that jurisdiction and it recognizes that the provisions of the Interstate Commerce Act govern the proposal in issue."

The remaining question, therefore, is whether ConRail is bound to observe prospective orders entered by the Commission against a predecessor railroad. We agree with the complainant railroads in this proceeding that the applicable case law supports the conclusion that ConRail is bound to the decision and order in this case.

In *Interstate Commerce Commission* v. *Western New York & P.R. Co., supra,* the Commission sought to restrain the violation of a cease and desist order it had entered in 1892 against certain railroads which it had found to have engaged in unjust discrimination in violation of the Interstate Commerce Act. After the issuance of the Commission's cease and desist order but before the commencement of the court action, ownership, control and operation of the defendant railroads before the Commission had been assumed by new companies. In the court proceedings, the Commission joined as defendants the two new companies which had succeeded to the interests of the railroads against which the 1892 order had been directed on the ground that the new companies had "wilfully failed and neglected and refused to obey and conform to the requirements of the order of the Commission." *Western New York, supra,* at 194. The two successor railroads argued that since they were not parties to the proceedings before the Commission, the 1892 order had no application to them. The court flatly rejected the successor railroads' argument, and stated:

> The order, however, here sought to be enforced, was made against the old railroad companies, to which the Western New York & Pennsylvania Railway Company and the Erie Railroad Company, respectively, have since become successors. The question then is, are these succeeding companies to be regarded as strangers to that order? We cannot think so. It would indeed be lamentable if a lawful order against unjust discrimination by a railroad company, made by the Interstate Commerce Commission after a protracted investigation, could be nullified by the subsequent reorganization of the company, or transfer of its railroad and franchises to another corporation. It is a settled principle that the purchaser of property in litigation, pendente lite, is bound by the judgment or decree in the suit. 1 Story, Eq. Jur. § 405. And the rule is said to be founded upon great public policy, for otherwise alienations made during a suit might defeat its whole purpose, and there would be no end to litigation. 82 F. at 194.

The principle cited in *Western New York* is thus applicable and conclusive on the issue of ConRail's obligation to comply with the Commission's decision and order in this proceeding. See also *Behlmer* v. *Louisville & N.R. Co., supra.*

ConRail's final argument that it has never been afforded a hearing in this case must be dismissed in light of our previous determinations. ConRail's predecessor corporations were afforded a full hearing during the adjudication of the proceeding in docket No. 34275, and ConRail itself was given an opportunity to be heard in this current part of the proceeding. Under the theory of legal succession, ConRail is thus bound by the decision and order entered against the bankrupt defendant railroads, and is subject to its enforcement without violation of section 15(6)(a) of the Interstate Commerce Act and the hearing requirements of the Administrative Procedure Act.

ULTIMATE FINDINGS AND ORDER

We find, That ConRail is a legal successor in interest to the bankrupt defendant railroads in this proceeding whose operations it has assumed.

We further find, That as a successor in interest to the bankrupt defendant railroads, ConRail is bound fully to the requirements of the decision and order of the Commission in this proceeding, entered September 19, 1975, affirmed by order served February 13, 1976.

And we further find, That this decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

It is ordered, That ConRail be, and it is hereby, made a party to this proceeding by virtue of its succession in interest and title to the various official territory defendants whose property and operations it has assumed.

It is further ordered, That ConRail be, and it is hereby, required to comply with the decision and order of the Commission entered September 19, 1975.

It is further ordered, That the compliance date set forth in the Commission's order of February 13, 1976, as modified by orders served May 11, May 28, and June 8, 1976, be, and it is hereby, established as 45 days from the date of service of this order.

And it is further ordered, That this order shall continue in force until further order of the Commission.

No. 35939

MOTOR VEHICLES, TRUCKAWAY SERVICE, FROM AND TO POINTS IN THE UNITED STATES

Assailed percentage increase found just and reasonable but the Mackinac Bridge crossing charges found not shown to be just and reasonable. Just and reasonable bridge crossing charge found to be not more than $5.50 for a five-axle tractor-trailer combination. Schedules ordered canceled without prejudice to the filing of tariffs in conformity with the view expressed herein and the findings made.

Walter N. Bieneman for respondent.

Martin J. Leavitt, Ronald C. Nesmith, and *Robert A. Sullivan* for protestant.

DECISION AND ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Review Board Number 4, Members *Frederick, Shaw,* and *Fisher,* held at its office in Washington, D.C., on the 4th day of May 1976.

Upon consideration of the record in the above-captioned proceeding, including: (1) the initial decision of the Administrative Law Judge, (2) the limited exceptions (including a motion to strike three reply verified statements) filed by protestant on February 20, 1975; and (3) the reply filed by Automobile Transporters Tariff Bureau, Inc., on April 9, 1975; and

It appearing, That the Administrative Law Judge found that the percentage increase in rates was just and reasonable but that the Mackinac Bridge crossing charges were not shown to be just and reasonable, and recommended that the schedules be canceled without prejudice to the republication of said schedules containing Mackinac Bridge crossing charges no greater than $5.50 per five-axle tractor-trailer combination;

It further appearing, That protestant's motion to strike three verified statements in reply filed by witnesses for respondent is predicated upon the fact that these witnesses submitted no direct testimony to which protestant could reply; and that since the replies contain proper rebuttal evidence by respondent's witnesses the motion to strike should be denied;

nd it further appearing, That the exceptions do not show any
erial errors in the Administrative Law Judge's statement and
luation of the facts, conclusions of law, or findings; do not raise
material matters of fact or law not adequately considered and
perly disposed of in the report of the Administrative Law Judge;
are not of such nature as to require the issuance of a report by
iew Board Number 4 discussing the evidence submitted and the
iments advanced by the parties in the light of the exceptions;
'herefore, and good cause appearing therefor:
'e find, That the evidence considered in the light of the
eptions and the reply does not warrant a result different from
reached by the Administrative Law Judge; and that his
ement of facts, conclusions, and findings, being proper and
ect in all material respects, be, and they are hereby, affirmed
adopted as our own.
is ordered, That the protestants' motion to strike three reply
fied statements filed by witnesses for respondent be, and it is
by, denied.
is further ordered, That the respondents herein be, and they are
by, notified and required to cancel the schedules described in
order entered in this proceeding on December 3, 1973, by the
imission's Suspension and Fourth Section Board, on or before
ays from the date of service of this decision and order, upon not
than 1 day's notice to this Commission and to the general public
ling and posting in the manner prescribed by the Commission
r section 217 of the Interstate Commerce Act; that this order
nd it is hereby, entered without prejudice to the respondents'
ng of the schedules in conformity with the findings made in the
il decision; and that this proceeding be, and it is hereby,
ntinued.

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e statement of facts, conclusions, and findings of
inistrative Law Judge Richard A. White follows:

chedules which became effective December 11, 1973, respondent Automobile
porters Tariff Bureau, Inc. (ATTB), published what it describes as a 5-percent
se in two tariffs. The increase in tariff No. 164-H, MF-I.C.C. No. 287 applies on
ted automobiles transported from named ports and preparation centers along
I.C.C.

the Atlantic seaboard (from Baltimore, Md., to Boston, Mass.) to points in 25 States and the District of Columbia. Thirteen motor carriers participate in the tariff. The increase in tariff No. 165-I, MF-I.C.C. 288 applies on imported vehicles moving from various ex-water and ex-rail origins in the Great Lakes area of the Midwest to points in 31 States and the District of Columbia. Fourteen carriers join in the tariff. The increases were protested by Volkswagen of America, Inc., and its subsidiaries, and though not suspended were made the subject of an investigation.

The Commission directed that the proceeding be handled under the modified procedure which provides for the parties to submit their evidence in the form of verified statements. Statements were submitted by respondent tariff bureau and by a cost consultant whose study purports to show that the assailed rates do not exceed a reasonable level. A verified statement was submitted by an official of the named protestant and by two consultants, one of whom speaks mainly to the lawfulness of incorporating the toll charges into the line-haul rates, while the other offered a cost study designed to establish that the assailed rates are unreasonably high. Reply verified statements were filed by respondent tariff bureau and three of the carriers participating in the assailed publications, namely, M & G Convoy, Inc., Nu-Car Carriers, Inc., and F. J. Boutell Driveaway, Co., Inc., and by the cost consultant. Argument memoranda were filed by counsel representing the parties. Protestant moved to strike portions of the original and reply statements filed by respondent tariff bureau, portions of the reply statement submitted by the cost consultant as well as the reply statements in their entirety offered by the three participating carriers. Respondent answered the motions to strike, and in turn moved to strike portions of the statements filed by protestants's official and by the consultant who testified regarding the lawfulness of incorporating the toll charges into the line-haul rates.

Each of the assailed publications contains four different groups or columns of rates. The columns A and B rates apply on vehicles weighing under 2,500 pounds. The column A rates are higher and require a minimum load of six vehicles on a truck, while the column B rates require a minimum of seven vehicles. The column C rates apply on vehicles weighing between 2,500 and 3,000 pounds while those in column D extend to vehicles weighing over 3,000 pounds. Both the columns C and D rates require minimum loads of six vehicles per truck. The column C rates are higher than either the column A or B rates while those in column D are higher than those in column C. Protestant's concern relates in the main to the rates in columns A and B inasmuch as these rates apply on vehicles weighing less than 2,500 pounds. Substantially all the Volkswagen traffic moves under the column B, seven-vehicle minimum rates.

RESPONDENT'S EVIDENCE

Respondent relies on rate comparisons and a cost study in support of its belief that the assailed increases are just and reasonable. This section of the report will in the main discuss the rate comparisons and the incorporation of certain accessorial charges into the line-haul rates. The cost evidence will be treated in a separate section of the report.

For some years the predecessor publications of the assailed tariffs contained provisions described as "toll charges" whereby a designated charge was added to the line-haul rate. In the assailed publications these charges have been incorporated into the line-haul rates. Respondent submits that this does result in an increase in the total charge which the shipper must pay but merely alters the way the charge is computed. For example, the prior publication in the tariff No. 164 series carried a column A rate of $59.60 per vehicle, applicable to a load of six vehicles, from Baltimore and Dundalk, Md., to Hartford, Conn. The 5-percent increase is said to bring the charge to $62.10. The toll charge on a six-vehicle load to Connecticut is $28.20 or $4.70 per vehicle. Application of the latter charge to the rate of $62.10 produces a total figure of $66.80 which is the rate under investigation. With the publication of the assailed schedules the toll charges in both tariffs were canceled except as hereinafter noted. Respondent submits that toll charges at one time applied on the movement of domestic automobiles but were eliminated in the same fashion as was accomplished in the assailed schedules. The change will expedite the preparation and improve the accuracy of freight bills and will make it easier for the shipper to verify the bills.

Respondent tariff bureau submits that automobile transporters depend mainly on the traffic tendered by the four major domestic producers to sustain their operations. The rates charged these accounts are watched closely and they are constantly being increased to reflect the increased cost of conducting business. In contrast, the transportation of imported automobiles represents only a small percentage of the domestic volume and the level of these rates has not been watched as closely with the result that rate increases on imported traffic have generally lagged in relation to the increases applied on movements of domestic automobiles. About the time the assailed publications were filed respondent tariff bureau received information from its members that labor costs increased about 7.2 percent effective September 1, 1973, and that there had been sharp increases in fuel, truck parts, pension and welfare payments, office salaries, and Social Security taxes.

Nu Car Carriers, Inc., in its tariff series 40 publishes rates on automobiles from Edison Township, Middlesex County, N.J. There is no provision specifying a minimum number of vehicles to be loaded on a truck, nor is there a charge for dropoff service or circuity. The cost of these services was taken into account in establishing the rate level. A single per-vehicle rate applies from origin to destination regardless of the circuity entailed by the truck in making delivery. Such a method of publication affords the shipper a ready means of checking the correctness of the charge being assessed. The only vehicles transported under this tariff are Pinto automobiles produced by the Ford Motor Company at or near Edison. The vehicles weigh between 2,344 and 2,554 pounds and about 2,400 units move south each month. During the first 9 months of 1973, the average load was 7.4 vehicles per truck. Within recent months the average increased to 7.9 per truck. Respondent participates in the movement of Volkswagens pursuant to the column B rates in tariff No. 164-H. An average load is comprised of seven vehicles. The volume of import traffic moving north from Baltimore is much less than the southbound movement out of Edison. About 100 imported vehicles move from Baltimore north to New Jersey each month.

Comparison is made of the tariff series 40 rates from Edison, as of June 5, 1974, including a fuel surcharge of 2 percent, to 12 points in Maryland, Delaware, and Virginia with the assailed rates including a 4-percent fuel surcharge from Baltimore to 12 points in New Jersey, Pennsylvania, and New York for comparable distances. The Edison rates for trips ranging from 109 to 226 miles produce from $286 to $481 per truckload and from $2.13 to $2.62 per mile. For the 158-mile trip from Edison to Baltimore the revenues are $368 per truck and $2.33 per mile. The assailed rates for approximately the same distances generate truckload revenue ranging from $169 to $378, and revenue per mile of from $1.57 to $1.91. Thus on the 157-mile trip from Baltimore to Sommerville, N.J., the revenues are $264 per truck and $1.68 per mile. The advantage the assailed tariff affords shippers persists even when the $5.25-per-vehicle charge for split delivery is added to the line-haul rate.

The above comparisons are predicated on the assumption that seven vehicles comprise a truckload. To the extent the load factor on movements from Edison exceeds seven vehicles the earnings are greater than those depicted. Though tariff series 40 does not require a minimum number of vehicles be loaded on a truck, the great volume of traffic handled out of Edison enables respondent to load its vehicles in the manner deemed most efficient.

Respondent M & G Convoy, Inc., participates in the movement of domestic automobile traffic from the Chrysler plant at Newark, Del., pursuant to the terms of ATTB Tariff No. 134. This tariff contains a five-vehicle truckload minimum. During the second quarter of 1974, 29,828 vehicles were moved from Newark. Import traffic is handled pursuant to the terms of E. J. Bannon's Tariff No. 4 and during the second quarter of 1974, 871 imported Chrysler vehicles with an average weight of 2,478 pounds and a load ratio of 6.93 vehicles per truck were handled. A minimum of six vehicles is required to comprise a truckload and each vehicle is subject to a toll charge in addition to the line-haul rate. Because of the large volume of traffic handled for Chrysler no problem is experienced in making up full truckloads to one destination or several closely grouped destinations. In such circumstances respondent submits there is no need for a truckload minimum. The cost of providing split delivery service is one of the elements taken into account in setting the level of the rates.

Under Bannon Tariff No. 4, which covers imported Chrysler vehicles from Japan received at Baltimore, respondent is securing about $9 per vehicle more revenue than it does on Volkswagen traffic handled under tariff No. 164-H at the seven-vehicle rate. An average of 3.5 drops per truckload are extended to the Chrysler imported traffic. Assuming the Volkswagen traffic required similar dropoff delivery service, the $5.25 charge per dropoff in the assailed publication would generate additional revenue of $18.37 per load or $2.65 per vehicle based on an average load of 6.93 vehicles. Thus even when the tariff No. 164-H dropoff charge is taken into account, shippers using the aforementioned tariff enjoy an advantage of more than $6 per vehicle.

Recently with the decline in sales volume, protestant is no longer always shipping in truckload quantities to single destinations. During the week ending May 31, 1974, on Volkswagen traffic moving through Port Newark, N.J., M & G handled 95 single-destination loads, 41 two-destination loads, 4 three-destination loads, 1 four-destination load, and 2 loads which entailed split pickups. For the week ended June 8, 1974, it handled 100 loads moving to single destinations, 35 going to two destinations, 7 three-destination loads, and 1 split pickup. Thus protestant is no longer consistently offering full trailer loads to single destinations.

Respondent also participates in the movement of Chrysler traffic from Detroit to the east pursuant to Bannon Tariff No. 2-L. During the first 6 months of 1974 a total of 46,146 vehicles were transported with an average of 6.95 units loaded on a truck. The tariff requires no truckload minimum and there is no charge for stopoff delivery service. Reference is made to 11 typical movements during April and May 1974 where the same driver and equipment which moved a load from Detroit to the East returned from Baltimore with a load to the West, or vice versa. The 11 eastbound movements aggregated 75 vehicles which moved a total of 5,263 miles producing revenue of $7,737 or an average of $1.47 per mile. The companion westbound movements (handled under assailed tariff No. 164-H) comprised 76 vehicles which moved a total of 6,523 miles producing aggregate revenue of $8,392 or $1.28 per mile. During the period studied the 4-percent fuel surcharge was in effect in tariff No. 164-H on the westbound movement, but the corresponding 3-percent increase on the eastbound movement did not become effective until the end of April with the result that three of the eastbound moves which occurred in April, prior to the increase, were not subject to the surcharge.

Each of the 11 eastbound movements entailed one or more dropoff deliveries for a total of 28 dropoffs. All the westbound moves comprised full loads to single destinations. Respondent shows that had the westbound traffic required dropoff service corresponding to the eastbound, additional revenue of $147 would have been generated causing the average revenue per mile to increase to $1.30, but still 17 cents less than that realized from the eastbound movements under tariff No. 2-L.

A comparison of 10 eastbound movements from Detroit under tariff No. 2-L and a corresponding number of westbound movements from Port Newark pursuant to tariff No. 164-H, during May and June 1974, for approximately equal distances, shows that the eastbound loads comprised a total of 72 vehicles which aggregated 2,393 miles producing revenue of $4,633, while the 10 westbound moves comprised 72 vehicles which moved an aggregate of 2,388 miles bringing in revenue of $3,946. The average revenue per eastbound move was $463 or $1.93 per loaded mile and $395 westbound or $1.65 per loaded mile. Five of the movements from Detroit entailed a total of 10 dropoff deliveries. Three of the movements from Port Newark entailed a total of six dropoff deliveries. Extending to the westbound movements the difference of four dropoffs at $5.25 each produces additional revenue of $21 which increases the revenue per mile to $1.66.

F. J. Boutell Driveway Co., Inc., publishes rates in its tariff No. 36 applicable at Baltimore on automobiles produced at named points in Belgium, Germany, and Japan where General Motors maintains plants. The principal import handled by respondent is the Opel which like the Volkswagen weighs less than 2,500 pounds. The rates in this tariff are not subject to a truckload minimum but respondent has no difficulty in forming loads of seven vehicles and it consistently handles such loads the same as it does on Volkswagen traffic moving pursuant to tariff No. 164-H. Respondent is tendered a substantial volume of General Motors domestic and import traffic and is free to assemble its loads in the way it deems to be most efficient with a given load going to one common destination or to several destinations where split delivery can be efficiently performed.

Comparison is made of the assailed seven-vehicle minimum rates with the tariff No. 36 rates including toll, from Baltimore, Md., to 14 points in Maryland, New Jersey, and Pennsylvania. The rates in the tariff under investigation range from $8.55 to $9.65 less per vehicle than do the compared rates. On a load of seven vehicles protestant's advantage ranges from $62.95 to $68.05. The compared rates are those in effect prior to December 21, 1973. Effective the latter date they were increased about 5 percent. The Boutell tariff unlike tariff No. 164-H does not impose a split delivery charge of $5.25 per vehicle. However, even when this charge is taken into account shippers using the assailed tariff have a clear though less pronounced advantage.

Respondent tariff bureau publishes rates in tariff No. 176 on automobiles shipped from a railhead at Norristown, Pa. The tariff contains no truckload minimum. American Motors vehicles including the Gremlin are handled under this tariff. Comparison of these rates with the assailed seven-vehicle rates from Baltimore, for comparable distances, shows that the advantage enjoyed by users of the latter tariff range from $5.30 per vehicle for a trip of about 98 miles to $7.80 for one of 178 miles. On the basis of seven-car load the advantage of the assailed tariff ranges from $37.10 to $54.60.

Tariff No. 176 also contains rates between Madison, Ill., and points in Illinois, Kentucky, and Missouri. American Motors vehicles including the Gremlin move under compared rates. There is no requirement for a minimum number of vehicles to be loaded on a truck. Comparison of the rates from Madison to four points in Illinois and Missouri with the assailed seven-vehicle rates in tariff No. 165-I from Chicago, Ill., to four points in Illinois, Indiana, and Iowa, for comparable distances, shows that the tariff No. 165-I rates have an advantage which depending on distance ranges from $2.05 to $6.80 per vehicle. Computed on a seven-vehicle truckload basis the difference ranges from $14.35 to $47.60.

Respondent tariff bureau publishes rates on domestic automobiles in tariff No. 116-U, from Kenosha, Wis. Comparison of the assailed tariff No. 165-I 7 vehicle rates from Chicago to five points in Wisconsin, Indiana, and Ohio, with the rates in tariff No. 116-U from Kenosha, to five points in Illinois, for comparable distances, shows that the domestic traffic brings in revenue per trailer-mile ranging from a high of $3.38 for distances of about 56 miles to $1.57 for a journey of about 218 miles, whereas the assailed rates produce revenue in a range of from $2.86 to $1.55. Traffic moving from Kenosha consists of American Motors vehicles including Gremlins. The compared rates sustained a 3-percent increase effective April 4, 1974.

Respondent concludes on the basis of the above comparisons that the rates on Volkswagens as now published are substantially below the charges applicable on competitive domestic traffic. To bring the assailed rates to a level comparable to those prevailing on domestic vehicles would require an increase of between 10 and 25 percent. This is true even though the toll charge is incorporated into the line-haul rates. Respondent concedes that most of the compared tariffs contain no requirement that the shipper tender any given number of vehicles at one time whereas, in contrast, the assailed publications require that the shipper tender six or seven vehicles at one time, but it emphasizes that the compared rates, for the most part, cover domestic shipments and the volume of traffic tendered is so large that it is unnecessary to publish a minimum-load restriction. Carriers are thereby free to make up truckloads and operate their vehicles in the way they deem to be most efficient.

PROTESTANT'S EVIDENCE

Volkswagen objects to incorporation of the "toll charge" into the line-haul rates. It traces the charge back several years when it appeared under other guises. Thus on August 1, 1970, the predecessor publications contained a charge captioned "Toll and Marshalling Charge" which by its terms applied on all vehicles transported by member carriers of respondent. The charge was $1.50 a vehicle and was in addition to certain specifically identified toll charges described in the publications. Protestant submits that no services justifying the charge were provided. On September 17, 1970, in supplement 3 to tariff No. 164-D, the aforementioned charge was canceled and an "Origin Terminal Handling Charge" of $1.50 per vehicle was published. The charge was designated as being imposed for "*** the preliminary preparation rendered at origin point prior to the actual handling of the vehicle." At the same time the specifically identified toll charges were increased. A similar change was effective September 17, 1970, in supplement 1 to tariff No. 165-E. Subsequently on May 7, 1971, in tariff No. 165 series and June 10, 1971, in tariff No. 164 series the "Origin Terminal Handling Charges" were deleted and in their place a toll charge which either increased the existing charges by $1.50, or instituted a new charge of $1.50 a vehicle applicable on each vehicle handled became effective. The increase in the tariff No. 165 series was not denoted by the appropriate symbol as being an increase.

On August 16, 1973, protestant informed respondent tariff bureau that the $1.50 charge imposed since August 1, 1970, had been improperly levied in that its vehicles had not been extended any marshalling or special handling services and that the vast majority of the units were transported over routes which did not require payment of tolls. On September 18, 1973, respondent tariff bureau proposed to its members that the toll charge be incorporated into the line-haul rates. Subsequently the change was approved and the modification was accomplished in the publications whose lawfulness is here in issue.

On or about March 17, 1974, protestant filed a lawsuit in the United States District Court, Eastern District of Michigan, Southern Division, challenging the legality of the toll charge. Respondent is said to have learned of the suit much earlier and had notice of the contemplated action on or about August 16, 1973, when it was advised of protestant's position on the subject. Protestant believes that the incorporation of the toll charges into the line-haul rates was a maneuver designed to thwart the effect of the lawsuit. Thus under no circumstances can the incorporation of the toll charge into the line-haul rates be justified as a tariff simplification measure designed to ease the burden on carriers and shippers of accurately computing charges. Protestant submits that the effect of the change is to assure that the toll charge, which is of dubious propriety and involved in a Federal lawsuit, is applied in an unjust, unreasonable, and illegal manner to each and every vehicle regardless of whether the vehicle receives the service for which the charge is imposed. It does not object to payment of toll charges in instances where shipments handled for its account actually incur toll expenses. It knows of no instance where the Commission has approved application of toll charges regardless of whether or not toll expenses are actually incurred. Inclusion of a toll charge in the line-haul rate is said to be improper because it leads to distortion of rates. Future general revenue increases will be based on a percentage of the line-haul rates, the latter including a toll charge element which may not have incurred a cost increase.

Protestant raises several other issues with respect to various aspects of the charges referred to in the foregoing account. First, it endeavored to determine whether the cancellation of the "Toll and Marshalling Charge" and the "Origin Terminal Handling Charge" was associated with any changes in operations provided by the carriers at points where shipments originate. On or about May 31, 1974, protestant's consultant visited Dundalk Marine Terminal, Md., where he spoke with the manager of the terminal and seven drivers of whom five had been hauling vehicles since at least May 1970. All the persons interviewed indicated that over the years there had been no change in the services provided by the carriers at origin.

Second, protestant questions whether the increase in toll charges over the years is related to corresponding increases in toll payments. A study was made of the toll rates for highways, bridges, and tunnels in 1970 as compared with 1973. Of the 24 highways studied, only 4 or 17 percent experienced increases; on 19 the tolls remained unchanged, while on 1 there was a decrease. The average increase over the period is less than 3 cents per vehicle assuming a seven-vehicle load. Of the 33 bridges or tunnels studied, the tolls on 5 increased, those on 27 were unchanged, while on 1 there was a reduction. The average increase per vehicle was about 9 cents. The seven carriers which supplied data for respondents' cost study reported transporting 409,593 vehicles in 1973 and to making toll payments of $453,582 or an average of $1.11 per vehicle. In contrast the predecessor publications in effect prior to December 11, 1973, provided for the payment of toll charges several times greater than the average 1973 toll expense. This establishes that the increase in toll charges over the years was under compared rates. There is no requirement for a minimum number of vehicles to be loaded on a truck. Comparison of the rates from Madison to four points in Illinois and Missouri with the assailed seven-vehicle rates in tariff No. 165-I from Chicago, Ill., to four points in Illinois, Indiana, and Iowa, for comparable distances, shows that the tariff No. 165-I rates have an advantage which depending on distance ranges from $2.05 to $6.80 per vehicle. Computed on a seven-vehicle truckload basis the difference ranges from $14.35 to $47.60.

Respondent tariff bureau publishes rates on domestic automobiles in tariff No. 116-U, from Kenosha, Wis. Comparison of the assailed tariff No. 165-I 7 vehicle rates from Chicago to five points in Wisconsin, Indiana, and Ohio, with the rates in tariff No. 116-U from Kenosha, to five points in Illinois, for comparable distances, shows that the domestic traffic brings in revenue per trailer-mile ranging from a high of $3.38 for distances of about 56 miles to $1.57 for a journey of about 218 miles, whereas the assailed rates produce revenue in a range of from $2.86 to $1.55. Traffic moving from Kenosha consists of American Motors vehicles including Gremlins. The compared rates sustained a 3-percent increase effective April 4, 1974.

Respondent concludes on the basis of the above comparisons that the rates on Volkswagens as now published are substantially below the charges applicable on competitive domestic traffic. To bring the assailed rates to a level comparable to those prevailing on domestic vehicles would require an increase of between 10 and 25 percent. This is true even though the toll charge is incorporated into the line-haul rates. Respondent concedes that most of the compared tariffs contain no requirement that the shipper tender any given number of vehicles at one time whereas, in contrast, the assailed publications require that the shipper tender six or seven vehicles at one time, but it emphasizes that the compared rates, for the most part, cover domestic shipments and the volume of traffic tendered is so large that it is unnecessary to publish a minimum-load restriction. Carriers are thereby free to make up truckloads and operate their vehicles in the way they deem to be most efficient.

PROTESTANT'S EVIDENCE

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Third, protestant disputes respondent's explanation that the practice of incorporating toll charges into the line-haul rates as was done in the assailed publications is patterned on the similar practice adopted several years ago with respect to tariffs covering domestic vehicle movements. Concerning the 1967 modification of tariff No. 10-0 covering movements from Lansing, Mich., protestant submits that toll charges were incorporated into the line-haul rates only with respect to those rates which in the prior tariff were specifically subject to toll charges. The same is true of the September 1965 revision of tariff No. 558 applicable on movements from Pontiac, Mich.

Finally reference is made to a certain anomaly in the way the assailed tariffs treat bridge crossing charges. Tariff No. 165-I, item 300 provides for a charge of $13 per truck or trailer crossing the Mackinac Bridge to reach the Upper Peninsula of Michigan. In contrast the charge is $11 in tariff No. 164-H. Protestant can perceive no reason for the difference. Since January 1, 1969, the one-way crossing charge for a five-axle truck is $5.50 or $11 for a round trip, but it is said to be unreasonable to charge the round trip toll when the trailer might return via the western route and not incur a toll expense.

Protestant also contends that the assailed publications and certain of their predecessors failed to comply with several rules in Tariff Circular MF No. 3. Rule 4(b) states:

> A tariff may provide rates from or to designated points by the addition or deduction of arbitraries or differentials from or to rates shown therein from or to base points, but provision for the addition or deduction of arbitraries or differentials shall be shown either in connection with the base rate or in a separate item which must specifically name the base point and clearly and definitely state the matter in which such arbitraries or differentials shall be applied.

Protestant believes it contrary to the terms of this rule to incorporate in a bridge or highway toll charge an amount to compensate carriers for unrelated services whether actually performed or not.

It seems clear that the purpose of the aforementioned rule is to require that the application of the arbitrary to the line-haul rates be made in a clear and definite manner so as to avoid confusion or uncertainty as to whether a particular rate is or is not subject to the arbitrary. Protestant does not contest whether the tariff makes the line-haul rates subject to the arbitrary (here a toll charge), but rather the reasonableness of the level of the arbitrary and whether the shipments incurred the services which the arbitrary was ostensibly designed to cover. The toll charges were intended by the tariffmaker to be applied to the line-haul rates and the tariff publications effected this intent in a manner which is consistent with the terms of rule 4(b). Accordingly there is no violation of tariff circular rule 4(b).

Objection is also made to the fact that tariff No. 165-I fails to conform to certain of the provisions of rule 7B of the tariff circular. That rule states:

> All tariff publications shall indicate changes made in existing rates, charges, classifications, rules, or other provisions by use of the following uniform symbols in connection with such change: [symbols omitted].

> Explanation of such symbols shall be provided (see rule 3(e)) in the publication in which they are used, and these symbols shall not be used for any other purpose.
>
> When a change of the same character is made in all or in substantially all rates in a tariff or supplement, or a page thereof, that fact and the nature of such change may be indicated in distinctive type at the top of the title page of such issue, or at the top of each page, as the case may be, in the following manner: "All rates in this issue are increases"; or "All rates on this page are reductions"; or there may be added, when appropriate, "except as otherwise provided in connection with particular rates." In complying with this paragraph, a bold-faced dot "**.**" shall be used to symbolize a rate or other provision in which no change has been made and the proper symbol shall be used for the purpose of denoting any other change not indicated by the general statement referred to above.

The predecessor of tariff No. 165-I was No. 165-H and item 350 of the latter tariff, according to protestant, authorized application of toll charges. Tariff No. 165-I, the publication whose lawfulness is here in issue, contains no item 350, but despite this, rate sections 4 and 5 have a column headed "**.** Toll Charge (x)". Reference mark "x" is indicated as meaning "Refer to item 350." Under the aforementioned column there are toll charges in connection with some movements. Protestant directs attention to the obvious contradiction between the reference to item 350 in rate sections 4 and 5 but the failure to set forth the terms of the item in the rules section of the tariff. It also points to the anomaly of the boldfaced dot "**.**", which means no change, alongside the failure to give meaning to the reference mark by publishing item 350. Finally there is the conflict of the boldfaced dot "**.**" against the publishing agent's justification for the tariff, dated October 25, 1973, wherein it was stated that for purposes of simplifying computation of freight charges the "toll charge" would be included in the line-haul rates and that all toll charges were canceled.

It seem obvious that tariff No. 165-I did contain a contradiction or ambiguity, but so far as the record shows protestant's rights as set forth in the Interstate Commerce Act were not abridged. The guidelines established over the years for resolving tariff disputes dictate that the toll charges listed in rate sections 4 and 5 under the column headed "**.** Toll Charge (x)" may not be applied because there was no corresponding rule in the tariff authorizing application of the toll charges. The confusion has been cleared through publication of tariff No. 165-J, MF-I.C.C. 344 and supplement 2 thereof with effective dates of August 29 and September 9, 1974, respectively. They are successor publications to tariff No. 165-I. It is not established that the tariff ambiguity of itself worked to protestant's disadvantage, but any toll charges collected by the members of respondent tariff bureau between December 11, 1973, and August 24-September 9, 1974, were imposed without tariff authority and, therefore, ought to be refunded. It is true with respect to tariff No. 165 series that the May 7, 1971, increases in toll charges and the establishment of new toll charges where heretofore there had been none, was not denoted by as an increase as required by rule 7B of the tariff circular, but the rules in the latter publication are designed to bring uniformity to tariff publishing practices. Infractions of the rules do not redound to the benefit of shippers unless the violations run counter to the Interstate Commerce Act, and there is no evidence or contention that this is so.

Concerning respondent's rate comparisons, protestant submits that the burden is on the carriers to justify the increase and comparisons with other tariffs cannot satisfy this obligation. Moreover, there are serious questions as to the relevancy of the comparisons inasmuch as the tariffs governing the movement of Volkswagens and the transportation conditions attaching to the movement of this traffic differ from the compared tariffs and the circumstances surrounding movements thereunder. The principal difference and the one stressed most frequently is that the assailed tariffs contain a six- or seven-vehicle truckload minimum provision whereas the compared publications, with the exception of Bannon's Tariff No. 4 and ATTB Tariff No. 134, do not require that a minimum number of vehicles be loaded on a truck. Thus under most of the compared tariffs, respondent carriers could be required to transport a shipment as small as a single vehicle at the single-vehicle rate. In contrast most Volkswagens are loaded seven on a truck and application of the column B rates is dependent on minimum loads of seven cars. The usual Volkswagen shipment comprises a seven-car load, and such a load is attainable even when one of the vehicles is a camper or bus type. If the load consists entirely of the classic Volkswagen "bug" eight such vehicles may be loaded on a truck. Another characteristic which distinguishes Volkswagen traffic is that invariably carriers are tendered full loads at origin and that the load moves to a single destination for delivery. The compared tariffs applicable on the movement of domestic automobiles allow the loading of full-size vehicles with the result that a fewer number of such vehicles can be loaded on a trailer than is the case with the seven or eight Volkwagens which the typical trailer can accommodate.

There are other ways in which the compared tariffs differ from those assailed. For example, Nu-Car Carriers tariff series 40 permits more than one shipment for movement to more than one consignee or destination to be loaded on a single truck. Respondent's tariffs Nos. 176 and 116 series allow up to 2 hours free time for stops en route, while tariff No. 134 series contains a storage-in-transit provision. Objection is made to the M & G Convoy comparison of Bannon Tariff No. 4, six-vehicle minimum rate, covering movements from Baltimore to 14 points in Maryland, New Jersey, and Pennsylvania. Had the comparison been made with the assailed column D, six-vehicle minimum rate, (applicable on cars weighing over 3,000 pounds), the latter rates for each of the compared movements except to Rockville and Silver Spring, Md., are higher than those in the Bannon tariff. On the basis of a seven vehicle load the column D rates produce substantially more revenue than do the compared rates except to Rockville and Silver Spring where the compared rates produce 35 cents and $10.15 more revenue, respectively. Furthermore, M & G does not show the weight of the vehicles which it transports under the Bannon tariff.

Protestant points out that the comparison by respondent Boutell of the assailed minimum seven-vehicle rate with the tariff series No. 36 no minimum rate, plus toll charge, is unfair not only because the latter rate does not require loading of a minimum number of vehicles but also because the latter rates include an origin terminal handling service. No such service is performed in connection with the movement of Volkswagens.

Protestant submits that respondents have not shown that the traffic conditions in connection with movements under the involved tariffs are in any way similar to the movements made under the compared tariffs. The compared tariffs are structured in a manner entirely different, in terms of truckload minimums, stop-in-transit services, and split delivery movements, from the considered tariffs, and, therefore, no judgment may be made concerning the significance of the lower level of charges in the assailed publications.

COST PRESENTATION

Respondent

Respondent tariff bureau retained the services of a cost consultant to study motor carrier costs associated with the movement of imported automobiles under the assailed tariffs. The first step was the gathering of data. A total of 17 carriers participate in the tariffs and a poll taken by respondent identified 9 carriers as handling the predominant portion of the traffic. The consultant circulated a form to the nine carriers designed to obtain information for 1973 as to the number of imported vehicles handled, volume of loaded and empty trailer-miles operated, and representative destinations. The material furnished disclosed that the nine carriers, with the exception of Kenosha Auto Transport Co., handled significant volumes of traffic. The principal carriers at Baltimore, Md., were Automobile Transport, Inc. (ATI), F. J. Boutell Driveaway Co., Inc. (Boutell), Clark Transport Co., Inc. (Clark), and Nu-Car Carriers, Inc. (Nu-Car); at Port Newark-Elizabeth, N.J., they were Arco Auto Carriers, Inc. (Arco), M & G Convoy, Inc. (M & G), ATI, Boutell, and Nu-Car; at Boston, Mass., and Providence, R.I., the principal carrier was Nu-Car, at Toledo, Ohio they were Clark, Gate City Transport Co. (Gate City), and Square Deal Cartage Co. (Square Deal) while at Chicago they were Arco and Clark. As the result of information developed by the survey, the aforementioned eight carriers, were requested to provide detailed revenue and expense data relating to operations at the aforementioned terminals where they were the predominant carriers, investment in transportation property and equipment in 1973, and data pertaining to increases in operating costs incurred in the early part of 1974 compared with 1973.

All except Arco furnished the information requested. The latter does not maintain its records so as to be able to provide information relating to particular terminals and thus could not develop revenues and expenses separately for its Chicago and Port Newark operations. Accordingly data pertaining to this carrier was not included in the cost study.

The seven carriers which supplied data for the study provided breakdowns of operating expenses incurred and revenues realized at the study terminals during 1973. A breakdown of expenses was necessary to derive information which could be applied to the standard cost format to develop expenses separately between those related to distance and those not so related. Costs related to distance are included in the line-haul category. Those not so related are classed as terminal expenses and are shown separately for loading-unloading as distinguished from all other terminal expenses. The procedure followed in assigning or allocating expenses to the various categories followed the methods developed by the cost finding section of the Commission.

The study carriers showed that there were important increases in wage, health, welfare, pension, and fuel payments, and other operating costs during 1973 and January and February 1974. The increases are taken into account in the adjustment made in the 1973 operating expenses. With the 5-percent rate increase which became effective December 11, 1973, carriers which rely on owner-operators incurred a corresponding increase in purchased transportation costs.

The total expenses reported by the study carriers after adjustment to reflect January 1974 wage levels and February 1974 fuel prices were separated into four categories of expense, that is terminal loading and unloading, terminal—other expense, line-haul, and general overhead. To the extent possible expenses were assigned to these four categories. Expenses which could not be directly assigned were allocated on the basis of driver hours, equipment utilization, or estimates provided by the carriers. The expenses of each carrier at each terminal were separately tabulated. Expenses assigned or apportioned to general overhead were allocated to the other three categories on the basis of total expenses charged to these categories. Revenues covered by Account 3120-Freight Revenue-Local Cartage, Account 3130-Intercity Transportation for Other Carriers, and Account 3900-Other Operating Revenue, were deducted from operating expenses at each terminal except in one instance where Account 3130 mistakenly included traffic handled by the reporting carrier.

Each of the carriers reported the investment in carrier-operating property and the reserve for depreciation at the beginning and end of 1973, and from this information the average depreciated investment in 1973 was computed. An allowance for working capital was based on 5 percent of operating expenses for the year. Interest on depreciated investment and working capital was based on a 6-percent interest rate.

The total operating expenses of all carriers were combined and the resulting figure was divided by appropriate service units to arrive at a single set of unit costs applicable to operations under the considered tariffs. Expenses assigned or allocated to loading and unloading of $2,958,840 were divided by 409,503 automobiles, the number of vehicles loaded or unloaded by drivers operating from the study terminals in 1973, to arrive at a unit cost of $7.22 per vehicle. Total operating expenses for terminal operations, other than loading and unloading, came to $2,147,781. This figure divided by 449,392 vehicles results in a unit cost of $4.78 per automobile. This divisor is somewhat larger because it relates to total automobiles moving through the terminals, which for some carriers, is different from the loading and unloading count because drivers from other terminals are sometimes used in transporting cars through the terminals. Expenses for such drivers are included in the total expenses in the other terminals. Thus the total terminal cost comes to $12 per vehicle made up of $7.22 for loading and unloading plus $4.78 for other terminal handling.

The total line-haul expenses of the seven study carriers were $11,526,969. Division of the latter figure by 10,100,720 loaded trailer-miles results in a unit cost of $1.14120 per loaded trailer-mile. This procedure spreads the line-haul expense over loaded trailer-miles associated with the round-trip movement of equipment from the various study terminals. Costs per automobile-mile were computed to be 19.020 cents for a six-car load and 16.303 cents for a seven-car load.

The foregoing study, as briefly outlined, permitted the development of fully allocated costs from the principal origins to selected destinations and opened the way for comparison of costs with the assailed rates from and to the same points. The costs include 100 percent of the operating expenses, rents, taxes, and interest expense on depreciated investment including an allowance for working capital. No allowance was made for profit.

Costs are shown from Baltimore, Port Newark-Elizabeth, Providence, Boston, Toledo, and Chicago, to destinations which are representative of the points served by the study carriers in 1973 from the standpoint of traffic volume and geographic location. The costs for each of the considered movements are compared with the rates under investigation and rate to cost ratios were developed. The results of the study are shown in table A of respondent's cost statement dated April 1, 1974. The assailed column B rates are compared with the costs incurred for truckloads comprising seven cars, while the columns A, C, and D rates are compared with the costs for truckloads comprising loads of six cars.

As shown in table A, the column A rates failed in most instances to cover costs, and on the average accounted for 94 percent of costs thus failing by 6 percent to cover full costs. The column B rates are shown to be remunerative in some instances but not in others. The ratio of rates to fully allocated costs ranges from 89 to 118 percent with an average of 100 percent, or exactly equal to full costs with no margin for profit. The column C rates with but a single exception exceeded the full cost level with an overall average ratio of rates to costs of 112 percent or an excess of 12 percent over costs.

The column D rates exceeded costs in all instances and on the average the rate to cost ratio was 131 percent or 31 percent over full costs.

In operations conducted in 1973 by the seven study carriers from their 13 terminals, the average load per trailer ranged from 6.26 to 7.04 vehicles or an average of 6.73 units. Thus the average cost per automobile-mile for all loads transported would fall somewhere between the seven-car load cost of 16.303 cents per mile and the six-car load cost of 19.020 cents a mile. The average is made up of predominantly six- and seven-car loads but there were a few less than six- and eight-car loads.

Protestant is said to customarily limit itself to loading seven cars on a trailer. Though seven small cars such as the Volkswagen can be loaded on a trailer, it is very often the case that one or more larger cars are mixed with the shipment with the result that one less car is loaded. Most shipments under the considered tariffs comprise a mixture of vehicles of two weight brackets or occasionally three weight brackets though vehicles in the under-2,500-pound category predominate. Except for shipments of cars in the under-2,500-group, there are very few full loads of the heavier weight cars. Almost all of the heavier cars move in mixed loads with the smaller cars. The columns A and B rates, that is those on vehicles under 2,500 pounds, apply on the predominant portion of the protestant's traffic. Only a small percentage fall in the column C rates, or vehicles in the range of 2,500 to 3,000 pounds.

The aforestated costs were developed to reflect full loads of six and seven cars from origin through to destination. No adjustment was made to give effect to reductions in the average load resulting from split delivery because practically all Volkswagen movements are in full truckload quantities to a single destination. Though some small car movements, other than Volkswagens, entail split deliveries, in general this distribution characteristic is more typical of the heavier more expensive cars. Thus the ratio of the column D rates to costs overstates the earnings achieved on the heavier cars. In the opinion of respondent's cost consultant, the use of an average load factor for movements of the heavier cars, offset to some extent by credits for split delivery charges, results in higher costs and lower ratios of rates to costs for movements under the column D rates. As noted the rates in column D are substantially higher than those in the other columns. The vehicles which move under these rates are luxury or high performance machines with a value of up to 5 times that of the vehicles which move under the column A or B rates.

Respondent emphasizes that as the vast majority of Volkswagen automobiles move under the columns A and B rates, and as these rates account for 94 percent and 100 percent, respectively, of costs, the proposed increase is clearly justifiable. In many studies made by the Commission's cost finding section a standard allowance for profit, or revenue need, was included in the costs on the basis of an operating ratio of 93 percent. An allowance for profit based on a 93-percent operating ratio would provide a profit margin of about 7.5 percent above costs, or stated differently the ratio of rates to costs would have to amount to 107.5 percent to achieve an operating ratio of 93 percent. Thus for the column A rates to achieve the level of earnings represented by a ratio of 107.5 percent, they would have to be increased by an average of 14.4 percent, whereas the column B rates would have to be increased by an average of 7.5 percent.

COST PRESENTATION

Protestant and respondent's reply

Protestant's cost expert after evaluating respondent's study and examining the underlying work papers makes a two-pronged attack on the study. Respondent replied to the criticisms in a statement dated August 23, 1974. For convenience and a more ready understanding of the dispute protestant's objections and respondent's reply will be treated together.

Protestant's first major thrust is that no validity can be accorded the cost study because of certain lapses or failings. Neither the cost study nor the underlying workpapers provide a way for measuring or correcting for the failures and protestant submits the study must be rejected as invalid resulting in the failure of respondent to sustain its burden of justifying the lawfulness of the assailed increases.

Protestant objects first to the manner in which the study carriers were selected, pointing out that a total of 17 carriers participate in the tariffs, but data was only gathered from 7. This is not a statistically valid sample and there is no showing that the seven carriers studied are representative of the average carrier in the universe.

Respondent in reply submits that there was no selectivity in fixing the identity of the study carriers because every carrier handling a significant volume of imported vehicles under the considered tariffs, with one exception, was included in the cost study. Of the 9 initially polled carriers, one, Kenosha, transported 14,164 vehicles during the first 11 months of 1973 from four terminals of which 9,566 units moved out of Chicago. In contrast, Clark handled 54,816 vehicles in 1973 from Chicago alone. To confine the study to workable limits, costs for the Chicago area were based on information developed by Clark and no further consideration was given to Kenosha. Respondent states that the lack of data from Arco has no material effect on the results of the cost study because the two origins which this carrier serves, Chicago and Port Newark, are represented by Clark at the former and M & G, ATI, Boutell, and Nu-Car at the latter.

In response to protestant's criticism respondent's cost expert directed the respondent tariff bureau to determine the extent of the participation in the movement of imported vehicles of the eight carriers not originally polled. Four of the eight indicated they handled no traffic, three others stated that small or insignificant volumes were moved, while one, P & M Auto Transport, handled about 66,000 vehicles from Port Newark of which 39,000 were delivered locally with the balance moving in joint-line service. Data for operations at Newark was supplied by M & G, ATI, Boutell, and Nu-Car. Respondent does not believe the inclusion of data for P & M would reduce costs, but rather would have the opposite effect because of the steep expenses associated with delivery in the New York metropolitan area. Finally it is pointed out that protestant knows which carriers are handling the predominant portion of its traffic, but it has not produced any facts tending to cast doubt on the representativeness of the data submitted by the study carriers.

Protestant questions certain of the underlying data which the study carriers supplied to their cost expert. It notes that Nu-Car reported handling 27,015 vehicles from Boston, Providence, and New Haven, whereas protestant's records indicate that a total of 30,617 Volkswagens were handled out of the aforementioned terminals. The same carrier reportedly handled 53,018 automobiles from Toledo, whereas Volkswagen itself shipped 52,566 from this same point, suggesting that all but 452 of the cars handled by Nu-Car were Volkswagens. The above data clearly suggests that Nu-Car failed to report all vehicles handled.

Respondent in reply contends that protestant used the wrong count for car handled by Nu-Car at Boston, Providence, and New Haven. The correct figure as reflected in the cost study is 39,839 units. Thus it is clear that Nu-Car handled substantially more than the 30,617 Volkswagens which moved through the three-port area. In addition a carrier identified as C & M Trucking Company handled a large volume of imported vehicles through Boston destined to points in Massachusetts in 1973, but these vehicles did not move under the considered tariffs. However, the addition of these automobiles to the total moving through Boston would further widen the spread over the number of Volkswagens handled via the three ports.

Respondent emphasized that it does not claim that the number of imported vehicles reported by the study carriers represents all imported traffic moving through the terminals. The underlying work papers, a copy of which was furnished protestant, disclosed that Arco handled during the first 11 months of 1973, 16,863 units through Port Newark and 12,356 through Chicago. Moreover Kenosha, which was excused from the study, transported 14,164 vehicles during the same period through its Chicago, St. Paul, and Toledo terminals. These cars were not included in the study. Square Deal and Gate City as well as Kenosha reported that the Volkswagen was the principal car which moved through the Toledo terminal. Thus it is not surprising that Volkswagen should comprise such a large percentage of the total movement through this point.

Respondent emphasizes that loading and unloading expenses were computed on a total of 409,503 vehicles, but that terminal expenses, other than loading and unloading, were based on 449,302 units. The difference is represented by vehicles moving through terminals at Port Newark, Boston, Providence, and New Haven and is the number of vehicles where drivers from other terminals are used in transporting cars moved through the study terminal. The total number of cars moved through the study terminals is, therefore, 449,392 rather than 409,503.

Protestant is critical of the method used by respondent in allocating expenses to the various service categories. It points out, for example, that some method is needed to apportion driver wages to "line-haul service," "terminal loading and unloading service," and "other terminal expenses." The Commission's cost formulas are said to require special studies in order that the aforementioned allocations may be made, but respondent conducted no such studies, relying instead on such subjective tests as "carrier judgment" or "consensus of carriers." Thus the portion of driver wages assigned to loading and unloading was 30 minutes per car. Hours of line-haul service was determined by dividing miles operated by 40 miles per hour. Equipment maintenance expense was evenly divided between the loading and unloading and the line-haul categories of expense. All of the aforementioned assignments were made on the basis of estimates or guesses supplied by the study carriers and protestant believes they have seriously distorted cost allocations. Reference is made to information developed by protestant's tariff consultant, who submitted a verified statement on other matters, which indicates that seven vehicles can be loaded within 45 to 60 minutes. This contrasts with respondent's allocation of 105 minutes to loading.

There is considerable doubt concerning the integrity of the study carriers terminal expense reports. There is no indication who prepared the reports and they are not verified. The terminal expense report of respondent Gate City is simply to the effect that 50.7 percent of system expenses are allocable to the terminal expense category, and is based simply on the fact that system costs bear the same relation to the terminal portion of system revenues.

In reply respondent states that there is no requirement that allocation factors be based on special studies. Protestant has introduced no evidence or showing that the allocation factors used which concededly were based on "carrier judgment" or "consensus of carriers" are incorrect. Concerning the element of loading time, the verified statement of the tariff consultant makes no reference to loading time. Undoubtedly the loading-time information was relayed to the witness by unknown sources on his May 1974 visit to Dundalk Marine Terminal, but there is no solid evidence to this effect.

Respondent concedes that 15 minutes per vehicle was allocated for loading and the same for unloading. This factor was based on a "consensus of the carriers" which took into account, with respect to loading, such related work items as check-in, paperwork, and contact time, and with respect to unloading such additional work items as contacting consignees, skid drops, and paperwork. A labor-management agreement applicable at Edison, N.J., the production site of the Ford Pinto, provides that the loading service consumes 15 minutes per vehicle. Thus for a trailer loaded with seven vehicles drivers receive loading-time pay of 1 3/4 hours, or 15 minutes a vehicle which is exactly the time allocated by the study.

Concerning the criticism of the study carriers' terminal expense reports, respondent states that protestant, had it asked, would have been furnished the names of the officials which provided the reports. Gate City allocated 50.7 percent of system expenses to the Toledo terminal based on the revenue relationship of the company's Toledo and Detroit operations. There is no reason to believe that the expense distribution between the two terminals is not closely related to the revenue distribution.

Protestant questions the validity of the 34 different ratios used by respondent in restating the full year 1973 expense figures to the January-February 1974 level. None of the ratios was based on a reliable study. All are simply "carrier estimates." Protestant holds that the assailed 5-percent increase in rates does not justify respondent in showing similar increases in the categories of purchased transportation and equipment rents without drivers. A study of owner-operator actual costs is said to be required.

Respondent concedes that no study of owner-operator costs was made but it submits that carrier payments for purchased transportation in developing terminal and line-haul costs is proper. Furthermore, the decision in *Motor Carrier Rates—Owner-Operators*, 341 I.C.C. 28, permits the use of regional average costs as a test of the compensativeness of a given rate, and relying thereon respondent compares the costs developed by its study with the regional average cost per vehicle mile shown in I.C.C. Statement No. 2C1-71. Because most of the considered traffic moves between New England and the Middle Atlantic region and within the Middle Atlantic and central regions, the variable cost per vehicle mile (loaded or empty) in these regions as shown in the aforementioned statement is multiplied by the study carriers' loaded-and-empty-mile figure of 19,216,879 to give the total line-haul expense. Dividing the latter by the loaded-mile figure of 10,100,720 miles gives the cost per loaded vehicle-mile. Recognizing that motor carrier costs increased by 10 percent from July 1971 to July 1973, and by at least 5.5 percent as of February 1974 over mid-1973, respondent applies what it considers to be a conservative increase of 15 percent to the figures developed by the aforesaid formula to produce costs per vehicle-mile as of February 1974. The following table shows the results of the computation on the fully allocated cost level:

TABLE

Region	Fully allocated cost per loaded vehicle-mile
	(cents)
New England Group II	139.865
Middle Atlantic	125.787
Central	131.736

The variable costs per loaded vehicle-mile are 90 percent of those shown. The above figures compare with the 114.120-cent figure developed by the cost study, and establish according to respondent that the latter is a conservative statement.

Protestant states that the fuel increase ratios are based on unverified data purporting to represent the cost of fuel at certain dates during the study year. No attempt was made to show the impact of the different prices per gallon, or the quantity contracted for or purchased at the different price levels.

In reply respondent explains that there was no reason to require the carriers to show the number of gallons purchased at each of the various 1973 price levels. Rather they were asked to furnish average costs effective at various times during 1973. From this information a weighted average cost based on the length of time each fuel expense figure was in effect was computed. This approach assumes that the consumption of fuel is uniformly distributed throughout the year. The adjustment of expenses to the January-February 1974 level had the effect of increasing the 1973 fuel expense by 34.9 percent. As illustrative of the reasonableness of the increase factor, reference is made to the U.S. Department of Labor's Wholesale Price Index, which, in a release of June 13, 1974, shows that fuel (and related products and power) increased by 55.8 percent during the 12-month period ending May 1974. Figures published by the Association of American Railroads show that fuel cost for eastern district railroads as of January 1974 was 42 percent higher than the average cost in 1973. A later study shows that as of April 1974 the increase was 91 percent over the average 1973 cost.

Protestant objects to the increase factors applied to the wages of drivers, nondrivers, and mechanics, and to the health, welfare, and pension accounts because they are based on unverified data purporting to represent wages per hour and welfare expenses per week at several different dates during the study year, with no effort made to weigh these data against aggregate amounts actually paid during the various periods of time. Objection is also made to the actual level of the increase ratios applied to two of the study carriers, Boutell and M & G.

Respondent concedes that no attempt was made to apply the number of hours, numbers of miles, or other service units to wage rates, but the average costs in the various categories for the base year are weighted by the period of time for which they were in effect. The criticism concerning application of the increase factor to the expenses for Boutell and M & G is not valid because both use brokers and the ratio of 1.0458 was applied to the involved expenses to give effect to the increase in broker expense resulting from the December 11, 1973, rate increase.

Protestant submits that the increase in the base salary on which Social Security taxes are withheld of from $10,800 to $13,200 or 22 percent does not justify application of a 22-percent increase on the Social Security payments because no showing was made as to what portion of drivers' wages will actually incur the full impact of the increase.

Again respondent admits that no attempt was made to determine the percentage of drivers' wages on which the full percentage increase applied, but it believes that the full amount of the increase applies on wages paid to the vast majority of drivers. In 1973, Square Deal had 118 drivers on its payroll with an average wage $15,899. Gate City paid 21 drivers an average of $13,562. The above are said to be representative of wages paid throughout the industry. Furthermore, it is possible that on employees who change their employment during the year, the total amount of taxes paid by the carrier on behalf of such people could reflect combined earnings of more than $13,200, with the result that Social Security tax payments could be made on earnings of more than $13,200 per year.

Finally protestant objects to the 5-percent adjustment factor applied to various wage and nonwage expense categories because there is no explanation of how the increase was determined. Respondent points out that the assailed increase factor was actually applied only to ATI's expenses at Baltimore and Port Newark and Nu-Car's expenses at Baltimore and Boston. With respect to ATI, the adjustment was applied to expenses in the terminal category, that is, supervisory wages, and billing and collecting salaries. For Nu-Car the ratio was applied to the aforementioned items of expense and in addition wages for mechanics and garage employees. Wages for the aforementioned groups did not remain static, but increased by ratios commensurate with the increase in driver rates. Furthermore, the adjustment of costs to the January-February 1974 level is conservatively constructed in that it does not take into account the fact that no adjustment was made in such expenses as liability insurance, parts and outside repairs, cargo loss and damage, administrative and general expenses, and tractor and trailer depreciation.

Protestant's second principal criticism is to the effect that respondent's study, with certain quantifiable adjustments to expense and revenue items, establishes that the assailed rates exceed a reasonable level. For this purpose it works with or from the figures supplied by the study carriers, including those discussed under the heading of the first criticism, though of course it does so without waiving its previously stated objections. In general protestant contends that the way the study treats or fails to treat certain expense and revenue elements causes the former to be overstated and the latter understated with the result that the ratios of rates to costs as shown in table A of the statement dated April 1, 1974, do not reflect the actual experience of the carriers. With some reservations protestant is able to quatify the study's shortcomings and restate, for the same movements as shown in respondent's table A, the ratio of rates to fully allocated costs. The restatement, which is on two different bases, is shown in table 10 of protestant's critique dated July 1, 1974.

Respondent is said to have erred in comparing the assailed rates with costs prevailing as of January-February 1974. The proper practice would be to compare the rates with the level of expenses experienced prior to the October 24, 1973, filing date of the assailed tariffs. The effect of respondent's practice is to overstate the unit costs, while at the same time understating revenues by not including the 4-percent fuel surcharge which became effective March 1974. The first adjustment was to consider expenses at the full year 1973 level as reported by the study carriers with assignment of expenses to service categories in the exact manner as done by respondent. For this purpose a loading and unloading expense figure of $2,824,890, other terminal expenses of $2,102,728, and line-haul expenses of $10,793,214, or a grand total of $15,720,832 were used. The line-haul expense figure along with several other subsequently discussed adjustments is used in table 8 (line 9) in computing the average loaded cost per mile and underlies the rate to cost ratios at the "Recalculated 1973 Cost Level" as set forth in table 10, columns 1, 2, and 3 for all movements studied by respondent, and in table 9 for the shortest, longest, and the average haul from each of the six points of origin. The rates used in this comparison are those which became effective December 11, 1973. Protestant also shows the study carriers 1973 full year expenses as increased to the January-February 1974 cost level to be loading and unloading $2,958,840, other terminal $2,147,781, and line-haul $11,526,969, or a total of $16,633,590. The line-haul figure is carried forward to table 11, where along with several subsequently discussed adjustments, it is used in computing the average loaded cost per mile (line 9) and underlies the rate-cost ratios at the "Recalculated 1973 Cost Level Adjusted to Reflect January-February 1974 Costs and the Fuel Surcharge" as shown in columns 6, 7, and 8 of table 10 for all the movements studied by respondent, and in table 12 for the shortest, longest, and the average movement from each of the six points of origin. The rates used in this comparison are those which became effective December 11, 1973, increased 4 percent as a result of the fuel surcharge authorized by the Commission.

Respondent in reply submits there is no rule which requires that it use costs associated with 1973 operations. To do so gives effect to only a portion of the increases in wages, fuel, and other operating expenses experienced in 1973 and ignores the increases occurring in 1974. Comparison of the assailed rates with operating expenses for the year 1973 gives a distorted relationship of the cost-rate ratios. Such treatment reflects the average cost level as of mid-1973 and does not take into account the annual effect of increases experienced during the year. For most carriers the September 1, 1973, increase in driver wages amounted to about 5 percent. The increase was included in expenses only for the last 4 months of the year, and the effective level of the increase in relation to total expenses for the year amounted to one-third of 5 percent or 1.67 percent. Respondent insists that 1973 operating expenses must be adjusted to give annual effect to the various cost increases experienced during the year.

Respondent points out that its cost study developed data covering operations in 1973 because this is the most recent period for which annual data was available. The costs so developed, however, were adjusted to the January-February 1974 level, the latest period for which wage and price information was available. The assailed rates were in effect in February and thus there was a comparison of like with like. There is no basis in reason or logic for comparing rates as of December 11, 1973, with costs as of mid-1973. Respondent submits that its adjustment ratio was entirely reasonable and conservative. The 1973 operating expenses of the study carriers were, with full annual effect given to cost increases, $16,631,422. Adjustment of this figure to the January-February 1974 price level produces a figure of $17,544,191, or an increase of about 5.5 percent. This is said to be conservative in that it does not take into account certain increased operating expenses incurred up to February 1974 as was previously mentioned.

Concerning protestant's criticism of the failure to add the fuel surcharge to the assailed rates, respondent explains that the surcharge did not go into effect until March 15, 1974, whereas the cost study was largely completed prior to this date. It strenuously objects to the misapplication of the fuel surcharge by protestant in the restatement. Furthermore, the effect of the fuel surcharge is said to be a trade-off and does not result in a substantial improvement in the carriers' net revenues. This is because the revenue retained by the carriers on the major portion of the involved traffic did not increase. The Commission provided that the surcharge should go to the party responsible for payment of the fuel charge and carriers which employ owner-operators passed the surcharge on to the owner-operator. For purposes of gauging the general effect of the surcharge effect of the surcharge respondent shows that the increase on an annual basis in the 1973 intercity freight revenue accounts of the study carriers comes to $614,451 of which $267,201 or 43 percent is retained by the carrier and $347,250 or 57 percent is passed on to the owner-operator. It submits that the actual additional revenue brought in by the surcharge is less than that shown because of the reduced volume of traffic handled in 1974.

Criticism is directed at protestant's cost restatement at the so-called 1974 cost level insofar as they treat the fuel surcharge as shown in tables 10 and 12. In these tables which supposedly show respondent's cost at the 1974 level, protestant simply applied the 4-percent surcharge to the rates without adjusting the purchased transportation costs above the February 1974 expense level.

Protestant submits that respondent's cost study made serious omissions in the manner in which data was derived and applied in calculating the costs. Thus in computing line-haul costs respondent divided line-haul expenses by loaded trailer-miles, but not all the loaded trailer-miles were included in the divisor with the result that there is a significant overstatement of the loaded line-haul unit costs and an understatement of the table A rate-cost ratios. Specifically, respondent's loaded trailer-mile figure of 10,100,720 units is disputed on the ground that it comprises only the outbound loaded miles for all seven of the study carriers and assumes that all return trips are empty which is not the case as reflected in the underlying workpapers. The workpapers show that four carriers, namely M & G, Clark, Square Deal, and ATI have some loaded return movements and protestant contends that the loaded trailer-miles must be greater than those used by respondent in computing the line-haul unit cost. From the underlying workpapers it shows that the return empty miles amounted to only about 90 percent (table 3) of the outbound loaded miles. Therefore, it believes that some part of the return miles should properly be included in the total loaded trailer-miles used to compute the line-haul unit cost. Next it sought to determine what portion of the difference between loaded outbound miles and counted return empty miles are loaded return miles. The underlying workpapers provide data for ATI, Clark, and Square Deal at four origins from which this calculation can be made. Table 4 shows that 53 percent of the difference between the loaded outbound miles and the inbound empty miles are actually loaded miles. In table 5 protestant shows for all the study carriers that the total of the loaded outbound miles plus the loaded return miles comes to 10,624,656 units or miles. This represents an increase of about 5 percent over the 10,100,720 miles used by respondent in its study. Because of the quality of the data on which the computation is made, protestant believes its figure is conservative. In table 8 protestant divides the 10,624,656 loaded trailer-mile figure into its full year 1973 line-haul expense figure of $10,793,214 resulting in a cost per loaded trailer-mile of $1.01587. A similar calculation employing the 10,624,656 loaded trailer-miles divided into the study carriers full year 1973 line-haul expense figure increased to the January-February 1974 cost level of $11,526,969 results in a cost per loaded trailer-mile of $1.0849263 as shown in table 11.

Respondent contends that there is no basis for assuming that its study is predicated on the theory that "all return trip miles are empty." Although many trips involve a loaded movement in one direction and an empty movement in the reverse direction over the same route, there are a number of variations which produce more loaded than empty miles. For example on split delivery movements, the loaded-mile figure because of the need to serve several destinations could entail loaded miles which exceed the empty miles operated from the most distant destination back to the terminal. Another example would be where domestic loads were transported for a portion or all of the return movement. Respondent's cost expert insists that with the exception of a minor discrepancy, the 10,100,720 loaded trailer-mile figure is accurate and that it includes all loaded trailer-miles and not just outbound loaded Volkswagen movements. That this is so is established by the fact that the labor agreement between the carriers and the Teamsters Union provides for payment of drivers on a loaded-mile basis. The count of the loaded driver miles is compiled from the payroll records covering each trip operated by each driver. On each trip the number of loaded and empty miles are determined.

Respondent's workpapers show for the year 1973, 10,100,720 loaded miles and 9,116,159 empty miles, or a loaded-to-empty percentage of 111 percent. One carrier, Boutell, had initially reported 1,915,987 loaded miles from its Baltimore and Port Elizabeth terminals and a corresponding number of empty miles, but it also reported handling a large percentage of split loads. Because split deliveries generally result in more loaded than empty miles, respondent's cost expert requested the carrier to make a further examination of the trailer-miles originally furnished in its traffic study. Further data supplied by Boutell shows 1,927,028 loaded trailer-miles and 1,606,248 empty trailer miles. The loaded-mile figure was derived directly from the company's payroll report and represents actual payments to drivers. The revised figure of 1,927,028 loaded miles is 11,041 miles greater than was reported in the original study. The addition of 11,041 loaded miles to the total loaded-mile figure of 10,100,720 reduces the line-haul cost by one-tenth of 1 percent. The data originally supplied by all other carriers account for all loaded miles whether because of split delivery mileage or loaded mileage in return movements. Accordingly respondent insists there is no basis for protestant's adjustment of loaded trailer-miles from 10,100,720 to 10,624,656 or 5.2 percent as is done in tables 8 and 11.

Protestant's next quantifiable criticism relates to the way split delivery expenses are treated. Though respondent concedes that Volkswagen movements rarely involve split delivery service, expenses incurred in the performance of this service are included in the line-haul expenses reported by the study carrier, and are part of the final unit costs and rate-cost relationships. Thus split delivery costs are allocated to each automobile carried regardless of whether or not a particular movement incurred such an expense. Protestant argues that these costs should not be charged against protestant or other shippers of light-loading traffic.

Protestant then endeavored to determine the difference in cost between handling split delivery traffic and traffic not requiring this service. From respondent's underlying workpapers it was determined that about 30 percent or 19,344 outbound loads required split delivery service. See table 7. In table 8 the line-haul miles attributable to split delivery are calculated to be 386,880 derived by multiplying the 19,344 loads by 20 miles, the latter being the distance the average split delivery shipment is believed to move beyond the first unloading stop. Next the line-haul cost related to split delivery is figured to be $393,018 (386,880 times the line-haul cost per loaded trailer-mile of $1.0158647). Subtraction of the latter figure from the total line-haul expense figure of $10,793,214, produces a line-haul cost excluding split delivery of $10,400,196. Dividing the latter by the round trip loaded-mile figure of 10,624,656, produces a loaded cost per mile excluding split delivery of 0.9788736 cents at the

"Recalculated 1973 Cost Level." A similar procedure is followed in table 11 in developing the line-haul cost attributable to split delivery at the "Recalculated January-February 1974 Cost Level." Here the 386,880 split delivery miles at the line-haul cost per loaded trailer-mile of $1.0849263 produces a line-haul cost attributable to split delivery of $419,736. Subtraction of the latter figure from the total line-haul expense figure of $11,526,969, produces a line-haul cost excluding split delivery of $11,107,233. Dividing the latter figure by the 10,624,656 loaded trailer-miles results in an average loaded cost per mile, excluding split delivery, of $1.0454205. The ratio of line-haul cost per mile excluding split delivery costs is not more than 96.4 percent of the line-haul cost per mile including split delivery in both tables 8 and 11.

Protestant's records show that 226,577 vehicles moved out of the six selected origins comprising 55.3 percent of the 409,503 vehicles reportedly handled by respondents from the same origins. As respondent indicates that Volkswagens do not require split delivery service it seems clear that the magnitude of the split delivery service necessitated by the transportation of other vehicles is many times that calculated in the aforesaid restatements.

Respondent concedes that no adjustment was made in costs to give effect to reductions in the average load resulting from split deliveries, but no adjustment of line-haul expense is required, contrary to the opinion of protestant's expert, as there are no incremental costs included in the total line-haul dollars of expense. It submits that adjustment of the average load factor is the compensating factor required in computing line-haul costs for split delivery movements.

It is true that expenses for split delivery service were included in determining the cost per vehicle-mile but the mileage operated in split delivery service was also included. Thus the only way the inclusion of split delivery trips could increase the average cost per vehicle-mile would be if the cost per vehicle-mile on split delivery moves was much higher than that for miles operated with straight loads. However, this is not the case. Labor agreements provide that the driver is paid at the standard mileage rate even if only one vehicle is left from the original load. Thus the unit cost for split delivery mileage is no different from the unit cost for straight loads of seven vehicles. This is true not only for driver wages but also for line-haul maintenance costs, road taxes, fuel, insurance, and other variable costs. The variable costs remain at the same level whether one vehicle or seven are being hauled. Thus the computations in protestant's table 8 which show tha the average unit cost per loaded trailer-mile, after deducting split delivery expense, is 0.9788736 cents or about 96.4 percent of the incremental line-haul cost for traffic requiring split delivery services, are illogical because all of the expenses chargeable on a trailer-mile basis remain the same for both split loads and full trailer loads. The computations in this table as well as table 11 which seem to show otherwise are meaningless. For example, after deducting the purported split delivery expenses (line 8) the witness divided such reduced expense by the inflated total of loaded trailer miles which includes split delivery miles. Thus the numerator excludes split delivery expense, but the denominator includes all miles associated with split delivery movements. Respondent emphasizes that the reason no adjustment was made in the average load was because, as previously explained, in 1973 most Volkswagens moved in solid loads. However, there is now reason to believe that with the reduction in sales volume the number of split loads has increased thus causing the cost of transporting the vehicles to increase because of the reduction in the load factor.

Protestant's restated rate-cost ratios are shown for two different bases. One titled "Recalculated 1973 Cost Level" compares the assailed rates with the study carriers full year 1973 average loaded cost per mile, with adjustments for loaded round trip miles and line-haul cost attributable to split delivery, of 0.9788736 (or 0.1398391 cents an automobile-mile assuming a load of seven vehicles) cents plus a terminal cost of $11.58 per vehicle. The line-haul costs are calculated on a truckload comprising seven vehicles. In table 9 the rate-cost relationships are shown for the shortest, the average, and the longest hauls from each of the six origin points studied by respondent in table A. The assailed rates range from 5 to 23 percent in excess of fully allocated costs and the average is 13.2 percent. Table 10, columns 1, 2, and 3 shows the same information for all the movements studied by respondent. On the average the assailed rates are 13 percent in excess of costs indicative of an operating ratio of 88.5 percent.

Protestant's second restatement titled "Recalculated 1973 Cost Level Adjusted to Reflect January-February 1974 Costs and Fuel Surcharge" compares the assailed rates, increased 4 percent as the result of the fuel surcharge, with the study carriers full year 1973 average line-haul cost per mile, adjusted to reflect the January-February 1974 cost level and with the aforementioned round trip loaded miles and costs attributable to split delivery adjustments, of $1.0454205 (or 0.149346 cents an automobile-mile assuming a load of seven vehicles) plus a terminal cost of $12 a vehicle. In table 12 protestant shows the rate-cost ratios for the shortest, the average, and the longest haul, from the six origin terminals studied by respondent. The rate-cost ratios show that the profit margins range from 4 to 24 percent over fully allocated costs with an average of almost 11 percent. Table 10, columns 6, 7, and 8 show the same information for all the movements studied in respondent's table A. On the average the assailed rates exceed fully allocated costs by about 10 percent which is equivalent to an operating ratio of 90 percent.

Finally protestant argues that the assailed rates produce profit margins far in excess of those realized by any of the seven participating study carriers. The 1973 operating ratios of these carriers as shown in table 14 ranged from 92.7 to 101.4 and averaged 98.3. Protestant does not wish to imply that a ratio of 98.3 is satisfactory, but rates, which based on a 1973 cost level adjusted as hereinbefore stated, which gave a profit margin of 13 percent are prohibitively high and unreasonable. Furthermore had the various cost factors used by respondent been fully quantifiable, the rate-cost ratios would have been substantially higher producing ratios of between 85 and 88.5 for the restated 1973 cost basis.

In reply respondent submits that protestant's rate-cost ratios are incorrect, pointing out that the study carriers had 1973 operating expenses of $16,631,422 (with cost increase annualized) and operating revenues of $16,949,686 producing an operating ratio of 98.1 percent. The same categories adjusted to expenses and revenues at the January-February 1974 level are $17,544,191 and $17,673,510, producing an operating ratio of 99.3 percent. The study carriers net operating income in 1973 was $318,264 or less than 2 percent of operating revenue. The increase in rates effective December 11, 1973, did not offset the cost increases encountered in late 1973 and early 1974. It seems clear that the system operating ratio of the study carriers of 98.3 is entirely consistent with the 98.1 ratio established by the cost study.

Furthermore it is apparent that an operating ratio of 98.1 cannot be squared with the 13-percent profit margin developed by protestant's restatement at the 1973 cost level. The restatement covered only movements of seven-car loads moving under the column B rates. Nothing was said concerning the columns A, C, or D rates. Respondent refers to the fact that its study shows that the column A rates failed to cover costs in almost every one of the movements studied. The margin of revenues over expenses were substantially higher on the columns C and D rates because of the higher charges applicable on the more expensive cars. The irrational character of protestant's restatement is apparent when one attempts to square the purported 13-percent profit margin of the column B rates plus the even greater profit margins of the columns C and D rates with the 1973 operating ratio of 98.1 or a profit margin of less than 2 percent on total imported automobile traffic.

DISCUSSION AND CONCLUSIONS

Before discussing the substantive issues certain procedural matters must be considered. Respondent moves to strike those portions of the verified statements of protestant's witnesses and the argument of its counsel which relate to the lawfulness and/or the applicability of the "Toll and Marshalling Charge," "Origin Terminal Handling Charge," and "toll charges" on the ground that the assailed provisions were published in earlier tariffs and are no longer in effect. Resolution of the lawfulness of these provisions is said not to be relevant to the issue in this proceeding which relate merely to the lawfulness of the 5-percent increase in rates. Furthermore the "Toll and Marshalling Charge" and the "Origin Terminal Handling Charge" were the subject of the decision in docket No. 35807, *Volkswagen South Atlantic Distributor, Inc.* v. *F. J. Boutell Driveway Co., Inc., et al.*, decided April 22, 1974, by Review Board No. 4, which held that the assailed charges were properly applied on vehicles accorded the services which the charges covered, but on no others. The evidence of record did not provide a factual basis for determining the number of vehicles accorded the special services or those which were not, and the report held that resolution of this issue must be based on information known only to the parties. The proceeding was discontinued and petitions for reconsideration were denied July 3, 1974. The cited proceeding was ancillary to a complaint before the United States District Court for the District of Columbia which tribunal has original jurisdiction to determine the extent of complainant's damages. The fixing of damages, if any, is now pending in the United States District Court for the District of Columbia in Civil Action No. 1897-72. Complainant in the above-cited proceeding is a wholly owned subsidiary of Volkswagen of America, Inc., the protestant in this proceeding, and the latter's protest was filed on behalf of its subsidiaries. Respondent submits that as the lawfulness and applicability of the aformentioned charges in effect prior to May and June 1971, were considered by the Commission in docket No. 35807 they may not be collaterally attacked here.

Respondent stresses that the lawfulness of the "toll charges" may not be considered in this proceeding because this issue is pending in the case of *Volkswagen of America, Inc., et al.* v. *Arco Auto Carriers, Inc., et al.*, Civil Action No. 4-71240 in the United States District Court for the Eastern District of Michigan, Southern Division. The plaintiff in that proceeding indicated that it would file a related complaint with the Commission. Thus the lawfulness of the "toll charges" will be determined by the complaint proceeding to be filed with the Commission, after which the court will determine the amount, if any, of damage. It would be improper respondent submits for the Commission to determine in this proceeding issues relating to matters pending in another proceeding.

The clear import of the Commission's order of December 7, 1973, instituting this investigation, was to bring in issue the assailed schedules in their entirety including all the constituent elements or factors which comprise the rates. Thus the order is sufficiently broad to encompass the propriety of incorporating the "toll charges" into the line-haul rates as well as the lawfulness of the 5-percent increase and the level of the Mackinac Bridge charge.

Protestant offers several arguments as to why the incorporation of the "toll charge" into the line-haul rates is unlawful, but the one pressed most vigorously is that this charge and its predecessors, the "Origin Terminal Handling Charge" and the "Toll and Marshalling Charge" were levied on each vehicle transported regardless of whether the shipment received the services or moved over routes where toll expenses were incurred. Protestant has established beyond reasonable doubt that the three aforestated charges represent a continuing and successive effort on the part of respondent to collect a charge for certain services regardless of whether or not actually performed. Two of protestant's witnesses testified that its shipments had not been extended any services of the type which would warrant application of the "Toll and Marshalling Charge" or the "Origin Terminal Handling Charge" and that the vast majority of the vehicles were transported over routes which did not entail payment of "toll charges." In the *Volkswagen South Atlantic* case, *supra*, an affiliate of the protestant in this proceeding assailed the "Toll and Marshalling Charge" and the "Origin Terminal Handling Charge" on the twin grounds that they were inapplicable and unjust and unreasonable. The report concluded that the charges were applicable only on the vehicles accorded the special services covered by the rules. The record provided no way to determine the number or identity of shipments accorded the special services or those which were not and the report concluded that this was a matter to be determined by the parties from such information as they might have. The matter of measuring complainants' damages is now pending in Federal District Court for the District of Columbia. The issue of the applicability and reasonableness of the "toll charges" was not involved in the aforesaid proceeding but a lawsuit has been filed in the Federal District Court in Michigan and it is likely that an ancillary complaint will be filed with the Commission. Though it would be premature to speculate on the contentions which might be involved in such a complaint and any discussion would not be dispositive of the issues raised in the complaint, but reliance on the principle of *stare deceis* would appear to indicate that the Commission will find that the "toll charges" are applicable only as to those shipments which incur a toll expense.

Be this as it may however, the report in the *Volkswagen South Atlantic* case stands for the principle that the assailed charges are only applicable on shipments accorded the special services extended by the rules. The effect of respondent's action in incorporating the "toll charges" into the line-haul rates, which on this record is found to be the successor to the earlier provisions, is to extend the charge to all shipments and not just those which receive the special services. Thus it is apparent that the incorporation of the charges into the line-haul rates raises an issue of lawfulness which is not *res judicata* and respondent's motion to strike is denied.

Though the lawfulness of the incorporation of the "toll charges" is clearly a legitimate issue to be resolved on its merits, protestant presents no convincing evidence or argument that the assailed practice is violative of the provisions of the Interstate Commerce Act. This is so for several reasons. First, the principal issue in this proceeding is whether the assailed schedules comport with the just and reasonable provisions of section 216 of the act. In the resolution of this issue the question of the propriety of incorporating what was formerly an accessorial charge into the line-haul rates is beside the point. The issue here is whether the assailed rates as an entity are on a just and reasonable level, and not whether this or that factor should be incorporated into the line-haul rate.

It is true in a sense that respondent's action in cancelling the "toll charge" defeats the lawsuit filed by protestant in the Federal District Court for the Eastern District of

Michigan, Southern Division, but this is so only for shipments moving on and after December 11, 1973. Also the evidence of record is consistent with the conclusion that respondent's action was not taken in the interest of tariff simplification, but was designed to defeat for the future the benefit which might accrue to protestant if it were successful in prosecuting its complaint concerning the illegal exaction of the "toll charges." But again motive, intent, or purpose are not really pertinent. Except with respect to matters such as rebates or concessions, carriers are free to modify the terms under which their services are held out including the right to cancel a controversial charge and then turn around and increase the line-haul rates by the amount of the canceled tariff provision. In the past the Commission has discouraged the practice of incorporating accessorial charges into the line-haul rates because application of future general revenue increases might result in higher charges than would be the case if the accessorial charge had remained as a separate identifiable item. However there is no proscription in the act relating to this practice, and in the final analysis it must be judged on the conformity of the line-haul rates to the just and reasonable standards of section 216. Treatment of this issue can be more appropriately handled in the discussion relating to the cost evidence.

Protestant also argues that the increase in the "toll charges" over the years is many times greater than the increase in the highway, bridge, and tunnel tolls over the same period, but this argument though perhaps pertinent to the lawfulness of a separately published toll charge, loses its force when the charge is absorbed into the line-haul rate. When this occurs the issue turns on the lawfulness of the line-haul rate as an entity. Protestant however is on sound ground in attacking the Mackinac Bridge crossing charges. Such a charge should be on approximately the same level as the cost incurred in the crossing. Clearly there is no justification for tariff No. 164-H imposing a $11 charge and tariff No. 165-I levying a $13 charge. Also there is no warrant for applying a round trip toll charge when the vehicle may return via a nontoll route. The record indicates that the maximum crossing charge is $5.50 for a five-axle tractor-trailer combination and it is concluded that the assailed charges are unjust and unreasonable to the extent they exceed this figure.

Protestant's argument that the publication of the assailed accessorial charges or the efforts to eliminate the charges failed to conform to the rules in Tariff Circular MF No. 3 have been discussed in the main body of the report under the section headed "Protestant's Evidence" and there is no point in repeating the presentation.

Respondent seeks to justify the assailed schedules on the basis of both rate comparisons and a cost study. The compared rates apply on the movement of both domestic and imported vehicles between points in the same general area as where the assailed tariffs have application. They are on a higher level and produce greater revenue than do the assailed rates and respondent submits that if the latter were brought up to the level of the compared rates they would be subject to increases ranging from 14 to 25 percent. Protestant counters with the argument that the circumstances surrounding the compared movements and the tariff limitations are much looser than those which govern the movement of protestant's vehicles under the assailed tariffs.

Protestant seeks to strike portions of the initial verified statement submitted by the respondent tariff bureau on the ground that they are irrelevant and immaterial, or if relevant and material are conclusiary without benefit of any underlying factual predicate. Thus the testimony that the respondent carriers have experienced increased costs of conducting business, that the assailed import rates have not kept abreast with the increases applied on domestic shipments, and that protestant allegedly has enjoyed bargain transportation to such an extent that additional increases ranging from 14 to 25 percent are justified, is merely conclusiary without benefit of an underlying factual predicate on which to test the validity of the assertions.

Respondent's discussion of the incorporation of the "toll charges" into the line-haul rates is said to be irrelevant because there is no evidence that traffic moving under the provisions of these tariffs incur toll expenses. The attempt to justify incorporation of the charges into the line-haul rates on the ground that a similar course of action was taken several years ago on domestic movements is not an accurate statement of the treatment accorded domestic traffic.

Protestant requests that the rate comparisons made by respondent be striken on the ground of relevancy in that there are a number of features attaching to the compared rates and to the traffic which moves pursuant to these tariffs which distinguish them from the assailed tariffs and the Volkswagen traffic which moves under these tariffs. The principal distinguishing feature is that the compared tariffs are generally applicable on shipments with no minimum number of vehicles required to be loaded on a truck, or if there is a minimum restriction, it is less than the seven-vehicle minimum under which most Volkswagens move. Furthermore, the compared tariffs have no charge for dropoff delivery, and at least one of the publications has a storage-in-transit arrangement. The compared domestic tariffs including Nu-Car Tariff No. 40-S, and respondent's tariffs Nos. 176-C and 116-U apply on domestic vehicles and there is no convincing evidence showing the size of the vehicles transported under the compared tariffs or that the characteristics of the movements are comparable to the movement of Volkswagens. Protestant points out that if the six-vehicle minimum rates in Bannon Tariff No. 4 were compared with the assailed six-vehicle minimum rates, column D, the latter would show rates and revenues substantially higher than those shown in the Bannon tariff.

The motion to strike will be denied. The statements regarding increased cost of conducting business, the alleged lower level of import rates as compared with domestic rates, the bargain transportation enjoyed by protestant, and that incorporation of the "toll charges" into the line-haul rates was accomplished several years ago on domestic movements, were all testified to under oath by a competent witness. Protestant shows that respondent erred in equating the considered incorporation of the "toll charges" into the line-haul rates with the earlier practice on domestic movements, but disputes between parties as to the real state of the facts will not ordinarily support a motion to strike. It is true that the statement regarding the bargain transportation enjoyed by protestant is argumentative, but it is based on respondent's interpretation of the evidence offered in support of its position. The rate comparisons offered by respondent are generally relevant to the issues presented for disposition. Like the assailed rates they apply on automobiles including vehicles of the size of the Volkswagen and though, as hereinafter discussed, differences do attach to movements of traffic under the compared and assailed tariffs, these are matters which must be evaluated in light of all the evidence of record in order to reach a reasoned conclusion.

Protestant also filed motions to strike portions of the reply verified statements submitted by the respondent tariff bureau and its cost consultant, and in their entirety the three statements filed by Nu-Car, Boutell, and M & G. The latter are carriers which participate in the assailed tariffs. The motion relating to the cost study will be treated in a subsequent section of the report. In substance protestant contends that the reply verified statements are not confined to the rebuttal of evidence offered by it, but that new material which it has no opportunity to rebut is advanced. Relying on rule 49 of the Commission's General Rules of Practice and the decision in *Leonard Bros. Transf. & Stor. Co. Ext.—Oil Field Equip.*, 48 M.C.C. 773, protestant argues that fundamental fairness demands that respondent not be permitted to raise new issues in rebuttal. It submits with respect to the reply statement of the tariff bureau, that respondent's position to the effect that the propriety of incorporating the "toll charges" into the line-haul rate is immaterial to the real issue in this proceeding, and the disclosure of data relating to average loading and other circumstances surrounding the movement of traffic under the compared tariffs, is entirely new matter and ought not be permitted.

The motions relating to the reply statements filed by the three participating carriers explains that the latter filed no initial verified statements. Furthermore Nu-Car's reply statement contains a rate and revenue study presented for the first time, the Boutell statement gives additional data relating to the movement of import traffic out of Baltimore pursuant to tariff No. 36 as compared with movements under assailed tariff No. 164-H, while the M & G statement refers for the first time to the volume of traffic handled out of Newark, Del., the average load of imported Chrysler vehicles moving under Bannon Tariff No. 4, and a study comparing eastbound movements under Bannon Tariff No. 2-L with westbound movements under assailed tariff No. 164-H covering a period of time which was subsequent to the date respondent's initial statement was prepared.

There is no merit in the motions. Respondent tariff bureau in its initial statement prepared March 25, 1974, presented a twofold argument. First it explained that the incorporation of the "toll charges" into the line-haul rates was not a real issue because it did not result in a change in the total charge borne by the shipping public. Second, it offered certain rate comparisons which, it argued, tended to show that the assailed rates were on a less than reasonable level.

Protestant countered with facts and argument to the effect that incorporation of the "toll charges" was not lawful and that the compared tariffs and the traffic which they handled differed from the assailed tariffs and the Volkswagen traffic which moved thereunder. The rebuttal offered by respondent merely developed and expanded upon the very same issues. It is true that the three named carriers did not file initial statements, but the initial statement filed by respondent tariff bureau named and discussed the three carriers. The subject matters covered in the reply statements of Nu-Car and Boutell were mentioned in the respondent tariff bureau's initial statement dated March 25, 1974, and all that the carriers did was to describe in more detail the circumstances surrounding the movement of traffic under the compared rates. M & G did refer in its reply statement for the first time to tariff No. 2-L but it is not believed that this constitutes undue broadening of the issues inasmuch as the new showing merely relates to a comparison of rates and revenue under tariff No. 2-L with those under assailed tariff No. 164-H.

Considering in a substantive way the rate and revenue comparisons offered by respondent, it is clear that no weight can be given some of the compared rates and movements. Thus tariff No. 176 from Norristown, Pa., and Madison, Ill., and tariff No. 116-U from Kenosha, Wis., apply on the movement of domestic automobiles and there is nothing to show the range in the number of automobiles which are loaded on a truck for movement under these tariffs. Average loading is an important element in measuring the compensatory character of a rate and in the absence of such information no real weight may be accorded the comparison.

As pointed out by protestant the compared rates with but a few exceptions do not require that the shipper tender a minimum number of vehicles in order to comprise a shipment, whereas the assailed tariffs require that the shipper tender a minimum of six or seven vehicles at one time in order to comprise a truckload. Respondent refers to several compared movements where the actual loadings are comparable to the assailed column B, seven-vehicle rates. This is true of the movements of Pinto vehicles from Edison, N.J., under Nu-Car Tariff No. 40, imported Chrysler vehicles originated at Baltimore under Bannon Tariff No. 4, and domestic Chrysler movements from Detroit under Bannon Tariff No. 2-L. The Nu-Car Tariff No. 40 rate for the 158-mile trip from Edison to Baltimore produces, on the basis of a seven-vehicle load, $368 per truckload and $2.33 per mile whereas the assailed rate for a trip of about the same distance from Baltimore to Sommerville, N.J., generates $264 per truckload and $1.68 per mile. The rates on imported Chrysler vehicles, of about the same weight as Volkswagens, under the Bannon Tariff No. 4 are about $9 per vehicle more than the assailed rates. Even when the assailed rates are credited with dropoff charges comparable to the average number of dropoffs made under the compared tariff, they retain a substantial advantage for the shipper. The same type showing is seen when comparison is made between eastbound movements from Detroit under Bannon Tariff No. 2-L with westbound movements from Baltimore under assailed tariff No. 164-H. Thus in the important categories of average load and crediting the assailed rates with the normal pattern of dropoffs experienced in the compared movements, it is apparent that the shipper's ability to use the assailed tariffs affords it an advantage not available to those which ship under the compared tariffs. As protestant points out there are other ways in which the compared tariffs offer services which are not available under the assailed tariffs, but these matters are believed to have little or no significance in determining the worth of the rate and revenue comparisons.

Protestant moves to strike portions of the reply statement filed by respondent's cost consultant on the general grounds that new material of which protestant was not previously aware of and which it cannot rebut were offered for the first time. The motion covers 10 different subjects and embraces the full range of respondent's rebuttal. Respondent's original cost statement discussed the full sweep of the study in somewhat broad and general terms. Protestant after examining the study and the underlying workpapers made a twofold attack, one being chiefly critical while the other was a restatement of the rate-cost ratios. Respondent countered by exploring in more detail the basis for its study, and in this connection data not previously mentioned was presented. The new material related principally to expenses associated with purchased transportation and driver wages, the effect of the fuel surcharge, the development of fully allocated cost per loaded vehicle-mile based on regional average figures, and development of the total loaded trailer miles operated by the study carriers. All these subjects related to matters raised by protestant either in criticism or in its restatement of the study. The motion is denied.

The assailed tariffs contain four groupings or columns of rates and the 5-percent increase was applied across the board. The columns A and B rates apply on vehicles weighing under 2,500 pounds while the columns C and D rates cover heavier automobiles. Only one protestant opposes the increase and its vehicles take either the column A six-vehicle minimum rates or the column B seven-vehicle minimum rates. Most shipments are made pursuant to the column B rates and the major focus of the proceeding is directed to the just and reasonable character of these rates. Respondent developed a study whose purpose was to determine the fully allocated cost of handling traffic shipped under the assailed schedules. The study shows that the assailed column A six-vehicle minimum rates account on the average for 94 percent of costs while the column B rates on the average are 100 percent of full costs. The columns C and D rates are well in excess of full costs.

Evaluation of the study on the basis of respondent's initial showing, protestant's criticisms, and respondents reply establishes that the assailed rates are on a just and reasonable level. The study measured rate-cost relationships from operating data supplied by 7 of the 17 carriers which participate in the tariffs. The seven study carriers handle the predominant portion of traffic moving under the assailed tariffs and collectively they move a substantial volume of vehicles from the six principal origins where the traffic originates. Though no operating data was received from 10 carriers, the record discloses that 7 of the 10 handled little or no traffic. The three remaining carriers, Kenosha, Arco, and P & M, handled a significant volume of business, but the origins they served were well represented in terms of vehicles handled by one or more of the study carriers.

Protestant is critical of respondent's failure to develop a statistically sound sampling technique to be certain that the data collected from the study carriers is representative of the average carrier in the universe. Though respondent did not construct a randam statistical sampling study, the evidence shows that the major carriers participated in the study and the impact of their operating expenses gives a fair and representative account of actual expenses experienced in handling traffic under the assailed tariffs. Protestant is a substantial shipper of traffic but has supplied no information which impugns the representativeness of the data supplied by the study carriers.

Protestant is critical of respondent's updating the 1973 operating expenses to the January-February 1974 cost level, contending that the assailed rates should be compared with the cost level prevailing as of the October 1973 filing date of the assailed schedules. There is no merit in this position as it ignores expense increases occurring in late 1973 and early 1974. The reasonableness of a rate should be determined in relation to the cost of providing service for a period as close as possible to the submittal date of the proceeding to the Commission for disposition. Particularly under present-day economic conditions respondent did not err in comparing rates established in December 1973 with costs as of early 1974.

Respondent is faulted in its allocation of expenses to the various service categories and to the ratios used in updating 1973 expenses to the January-February 1974 cost level because no studies were made as a predicate for selection of the allocation factors or the update ratios. Respondent it is said relied on estimates, judgments or crude calculations and thus it has not sustained its burden of proof. Furthermore, the record does not disclose the identity of the persons submitting input data on behalf of the study carriers, and there is no verification of the data which is furnished.

Respondent's cost study is verified, but of course there was no verification of the underlying data on which the study was based. The proper time to assail the validity or accuracy of the input data is prior to submittal of the proceeding to the Commission for disposition. Protestant made no request for cross-examination, and in the absence of evidence to the contrary respondent's allocation factors and update ratios will be accepted. The burden of sustaining the just and reasonable character of the increase is on respondent, but carrier judgments are entitled to acceptance at face value if they square with standards of reasonable practice.

In its criticism of the allocation factors protestant relied for the most part on the argument that respondent had failed to meet its burden of proof. Only on two items did it assail specific allocation factors. The first related to driver wages allocable to the loading and unloading operation. Respondent allocated 15 minutes per vehicle for the loading operation and protestant believes that this is excessive and that something in the range of 7 to 9 minutes is more accurate. Respondent based its figure on a labor-management agreement at Edison, N.J., which provides for 15 minutes per vehicle, whereas protestant does not disclose in detail the basis used to reach its figure. Though it is clear that the Edison agreement does not by its terms cover imported automobiles, there are no real grounds for disputing respondent's allocation of time. Protestant's second specific criticism is to the terminal expense report of Gate City, one of the study carriers, which allocated 50.7 percent of system expenses to the Toledo terminal. The allocation was made on the basis of the revenue relationship of the company's Toledo and Detroit operations. Protestant furnishes no support for its suspicions concerning the accuracy of the computation and it is deemed to be accurate.

In arriving at the update ratios respondent prorated the increased operating costs over the various categories of expense. The cost of purchased transportation was increased 5 percent because of the 5-percent increase in rates. Protestant criticizes this practice because it does tie the cost increases to actual payouts. Respondent could have made a study of the type suggested but this would involve substantially greater expenditure of time and without reasonable expectation that the result would be significantly different. The development of the cost of purchased transportation was clearly proper under all the circumstances of record. The aforementioned discussion must be considered in relation to the fact that respondent's cost adjustment did not take into account increases attributable to such expense items as liability insurance, truck parts, loss and damage claims, and outside repairs, and in this context it is conservatively constructed. That this is so is illustrated by comparison of the unit cost per loaded trailer-mile of 114.120 cents developed by respondent's study as against the regional average figure of 125.787 for Middle Atlantic, 131.736 for central, and 139.865 for New England Group II.

Protestant lays great stress on the fact that respondent's loaded trailer-mile figure of 10,100,720 miles is understated causing the loaded line-haul unit costs to be overstated. It constructs what it believes to be a more accurate figure of 10,624,656 miles, but as explained in respondent's reply verified statement the original figure is substantially accurate and it includes all loaded miles operated by the study carriers and thus there is no basis for protestant's adjustment. Protestant used the inflated 10,624,656 figure in its restatement as a divisor in computing average loaded cost per mile, and this caused a significant understatement in the expense figure.

Another significant adjustment made by protestant was to deduct from total line-haul expenses an amount attributable to split delivery. However line-haul costs are not significantly affected by whether the trailer is carrying a full or less than a full load of vehicles. Such important expenses as driver wages, truck maintenance, depreciation, and fringe benefits remain the same regardless of the weight or units loaded on the truck.

Protestant in its restatement titled "Recalculated 1973 Cost Level Adjusted to Reflect January-February 1974 Costs and Fuel Surcharge" made the aforementioned adjustments in the study carriers' average loaded cost per mile and then struck rate-cost relationships by adding the 4-percent fuel surcharge to the assailed rates but without making a corresponding adjustment in the expense item of purchased transportation. Obviously such a one-sided adjustment is entitled to no weight.

The overall 1973 operating ratio of the study carriers was 98.3 percent, yet protestant would have it believed that the assailed rates produce, in relation to the full year 1973 expenses, revenue 13 percent in excess of full costs. The 13-percent profit margin pertains to the movement of seven vehicles to a truck and it would follow that the higher columns C and D rates would generate similar or even greater profit margins. But such inflated profit margins on the bulk of the traffic handled pursuant to the assailed tariffs cannot be squared with either the 98.3-percent operating ratio of the study carriers in 1973, nor the 98.1 ratio realized on the involved traffic.

The evidence establishes that the rate cost ratios developed in table A of the statement dated April 1, 1974, are an accurate portrayal of the respondent carriers actual experience. Considering that the columns A and B rates comprise on the average 94 and 100 percent of costs with no allowance for profit and that respondent carriers operating costs are understated, it is concluded that any rate distortion created by incorporating the "toll charges" into the line-haul rate is *de minimis*. In consideration of the showing made by the aforementioned rate comparisons and the rate-cost relationships referred to above, it is concluded that the assailed schedules, except with respect to Mackinac Bridge crossing charge, are just and reasonable.

FINDINGS

Upon consideration of all the evidence of record it is found that the assailed schedules are not shown to be just and reasonable without prejudice to the republicaton of such schedules containing Mackinac Bridge crossing charges no greater than $5.50 per tractor-trailer combination. An order will be entered requiring cancellation of the proposed schedules and discontinuing the investigation. It is further found that this decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

It is ordered, That respondent be, and it is hereby notified and required to cancel the schedules described in the order of December 7, 1973, upon not less than 1 day's notice to this Commission and to the general public by filing and posting in the manner prescribed under section 6 of the Interstate Commerce Act, without prejudice to the filing of new schedules in conformity with the above-stated conclusions and findings.

And it is further ordered, That the proceeding be, and it is hereby discontinued.

No. 36053

MONTANA INTRASTATE RAIL FREIGHT RATES AND CHARGES, 1974

Decided July 19, 1976

Montana intrastate freight rates and charges found to cause unjust discrimination against, and undue burden on, interstate commerce. Basis for removal thereof prescribed.

Robert B. Batchelder, J. Fred Simpson, Curtis H. Berg, and *William R. Power* for respondents.

C. H. Dickman, Geoffrey L. Brazier, Gene J. Carroll, William E. O'Leary, and *James B. Loken* for protestants.

REPORT AND ORDER OF THE COMMISSION

DIVISION 2, COMMISSIONERS HARDIN, O'NEAL, AND CLAPP

BY THE DIVISION:

Exceptions to the initial decision of the Administrative Law Judge were filed by protestants.[1] A reply was filed by respondent railroads operating within the State of Montana.[2]

Exceptions and requested findings not specifically discussed in our report nor reflected in our findings or conclusions have been considered and found not justified.

This investigation proceeding was instituted by Commission order of November 21, 1974, pursuant to sections 13(3) and 13(4) of the Interstate Commerce Act to determine whether and to what extent the intrastate freight rates and charges made or imposed by the State of Montana violate these sections of the act by the failure to apply intrastate rate increases corresponding to those approved on interstate traffic in Ex Parte No. 295, *Increased Freight Rates and Charges, 1973,* 344 I.C.C. 589 (woodchips and whole grains); Ex Parte No. 303 *Increased Freight Rates and Charges, 1974,* 349

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[1] Protestants are the Montana Consumer Counsel, the Montana Department of Agriculture (hereinafter referred to as the Montana State protestants), and the Hoerner Waldorf Corporation.

[2] Respondents are the Burlington Northern, Inc.; Chicago, Milwaukee, St. Paul & Pacific Railroad Company; and Union Pacific Railroad Company.

I.C.C. 862; and Ex Parte No. 305, *Nationwide Increase of Ten Percent in Freight Rates and Charges,* and the fuel surcharge as now incorporated into the X-305 series tariff.

In the initial decision the Administrative Law Judge found that the conditions incident to intrastate transportation of freight in Montana are not more favorable than those for interstate traffic and that the interstate freight rate increases approved in the above proceedings are just and reasonable and do not produce rates which exceed maximum reasonable levels. He concluded that the present intrastate freight rates and charges in Montana unjustly discriminate against interstate commerce, are abnormally low and do not contribute their fair share to the revenues needed by the respondent railroads to meet the goals of the national transportation policy. He found that this burden on and discrimination against interstate commerce are and would continue to be undue to the extent that the present intrastate rates and charges are less than those sought in this proceeding. He also found that this unlawfulness should be removed by applying to the Montana intrastate rates and charges the same respective increases as are maintained by the respondents on like interstate traffic between points in Montana and points in adjoining States. These increased intrastate rates, he found, would not produce unreasonable rates and charges, will substantially increase respondents' revenue and will not constitute more than a fair proportion of the respondents' total income. These findings were made without prejudice to the right of any interested party to apply for their modification for any individual intrastate rate or charge. The increases were then ordered on Montana intrastate traffic.

The Administrative Law Judge's recitation of the evidence and his discussion and conclusions based on it are included in the appendix.

In their exceptions, protestants request oral argument. The protestant Hoerner Waldorf Corporation argues that there are important questions concerning the quantity of evidence, Federal-State relations and the proper application of section 13(4) of the act. The Montana State protestants, Office of Consumer Counsel State of Montana, and Department of Agriculture State of Montana do not advance any reason for their joint request for oral argument. In reply, the respondents oppose the granting of oral argument because no profound legal issues are involved. The requests for oral argument are hereby denied because oral argument would not materially advance the disposition of the proceeding nor clarify any novel legal issues not adequately discussed by the parties in their written submissions.

The Montana State protestants' principal exception is that the initial decision found an undue burden on interstate commerce solely because of the revenue needs of the carriers, which, it is contended, are of little or no relevance to the issues in this proceeding. They maintain that this investigation is not a general revenue proceeding and that to find an unjust discrimination or undue burden on interstate commerce, section 13(4) of the Interstate Commerce Act requires the same elements of proof as section 3 of the act; a showing that any disparity between rates causes injury or damage. Here, they emphasize, no damage is even alleged.

The Montana State protestants also object to the Administrative Law Judge's findings (1) that a "substantial" disparity between interstate and intrastate rates exists, and (2) that the sought increase in intrastate rates would be reasonable. Respondents' comparison of four interstate grain movements from Montana to Spokane, Wash., with four Montana intrastate grain movements is alleged to be not only the basis for these two findings but also is alleged to be the foundation for the entire initial decision. The protestants' objection, allegedly ignored in the initial decision, is that the four interstate grain movements selected are not representative or proper because (1) the respondents admitted that little, if any, grain traffic moves from Montana to Spokane; (2) any movement of grain to Spokane would be allegedly under transit balance rates and not comparable to Montana intrastate rates; (3) there are 290 Montana grain elevators with 700 possible shipping origins, and (4) these movements were arbitrarily selected according to mileage.

The protestants insist that Montana intrastate rates contribute their fair share to the carriers' revenue needs. They maintain that the only evidence on this issue was their comparison of the ton-mile earnings from intrastate and interstate grain traffic. This study allegedly shows little correlation between the ton-mile earnings and length of haul for interstate Montana grain traffic and thus that the taper principle, which provides that generally ton-mile earnings decrease as the length of haul increases, is inapplicable to this traffic. They maintain that this interpretation of their evidence, which is the opposite of that made in the initial decision, proves that Montana intrastate rates do make a fair contribution to revenue. The protestants do not explain how they reach this conclusion.

In their remaining exceptions, the protestants contend that the initial decision's findings are not supported by the evidence. They argue that the present Montana intrastate rates cannot be shown to be unjustly discriminatory against interstate commerce since injury to, and thus undue prejudice and discrimination against, interstate shippers has not been shown. They allege that several other of the initial decision's findings apparently rest on the erroneous assumption that the Interstate Commerce Act mandates that intrastate rates receive the same increases as interstate rates.

Protestant Hoerner Waldorf Corporation maintains that the railroads have not shown a severe need for this extra revenue and opposes any increase of intrastate rates on pulpwood chips traffic. It is maintained that the carriers' need for more revenue from Montana intrastate operations was not quantified and that their systemwide data showing a decline in earnings and working capital from 1966 to 1973 is misleading in that it does not show improvement from 1970 to 1973. The protestant declares that these deficiencies in respondents' evidence are significant because the Commission must not interfere unless the revenue need is so substantial and pressing as to be an undue burden on interstate commerce.

This protestant also objects to the Commission's imposing a rate increase on intrastate traffic corresponding to that approved for interstate traffic in Ex Parte No. 305. On the one hand, the protestant contends that an unrestricted 10-percent intrastate rate increase would be more favorable to the railroads than the Ex Parte No. 305 interstate increase which is subject to reporting and spending limitations. It is argued that a more favorable intrastate increase may not be ordered by the Commission under section 13(4) of the act. On the other hand, the protestant argues that to impose the interstate reporting and expenditure limitations on intrastate revenue would usurp State authority over intrastate commerce and raise substantial administrative questions. The protestant is concerned that the Commission and not the Montana Public Service Commission would (1) decide what information is to be reported and how the revenue should be spent, (2) impose sanctions for noncompliance, and (3) modify the restrictions to best further intrastate commerce. The protestant insists that only the State authority should make these decisions and suggests that the 10-percent increase be denied in this proceeding to afford the Montana Commission an opportunity to consider the reporting and expenditure requirements.

This protestant also argues that its unrebutted evidence shows that there will be a substantial diversion of pulpwood chip traffic from rail to motor transportation if the intrastate rail rates are increased and that as a result of their loss of traffic, the railroads revenue from this portion of intrastate traffic will not be substantially increased. The protestant declares that the initial decision's finding that a 1974 loss of traffic indicates that diversion is independent of rail rates is erroneous, and submits that it changed its mode of transportation because of an impending rail rate increase. It alleges that the assumption that motor carrier rates will also increase is mere speculation and should be proven on the record. Also, the protestant contends that it is unlawful for the Commission to approve the intrastate increase and give the respondents the option to lower their rates to prevent diversion of this traffic. It is declared that the Commission may only inquire whether the proposed increase, if fully effective, would increase respondents' revenue; if not, it must be denied for provisional intrastate rate increases are allegedly the prerogative of the State authority.

Finally, it is contended that if the intrastate rate increase is ordered, pulpwood chip traffic should be exempt. The protestant insists that the present intrastate rates on pulpwood chips have been shown not to be abnormally low because they are more than 25 percent above variable costs while interstate pulpwood chip rates return only 88.2 percent of variable costs. It is also stated that the rate increase sought by the respondents would increase the intrastate revenue contribution above variable costs for pulpwood chip traffic by 100 percent and thus be unreasonable. Protestant further argues that in Montana, this woodchip traffic has more favorable intrastate trasportation conditions. In support, it states that the number of minutes spent switching between road train and industry at intrastate Montana pulpwood chip origin points is substantially less than respondents' systemwide average. The protestant declares that it has met its burden on these issues since its above evidence is unrebutted.

In their reply, the respondents contend that they have sustained their burden of proof to show that Montana intrastate rates unduly discriminate against and burden interstate commerce. They maintain that this is a general revenue proceeding and that their revenue needs should be considered but insist that these needs were not the sole rationale for the initial decision's findings. In particular, they summarize their evidence and declare that it shows interstate and intrastate freight are handled in substantially the same manner and that conditions incident to Montana intrastate transportation are not more favorable than those incident to interstate transportation. They also defend the increased intrastate rates as reasonable by referring to their rate comparisons as well as their financial needs. They contend that section 13(4) of the act indicates that the relative profitability of traffic segments, relative contribution over variable cost, and the like are irrelevant in determining if there is an undue burden cast on interstate commerce. Furthermore, respondents contend that the Montana State protestants' discussion of Montana interstate grain rates and the taper principle is irrelevant and improper. The respondents also note that the protestants had the burden to go forward and show why some or all of Montana intrastate traffic should be exempted and that they failed to do so.

The respondents also dispute that pulpwood chip traffic should be exempted from any intrastate rate increase. The protestants' variable cost evidence is said to be irrelevant in a general revenue proceeding, such as this, and to fail to prove that the present Montana intrastate rates on this commodity are at the maximum reasonable level. Furthermore, the respondents deny that the protestants' evidence of traffic diversion requires any exemption from a rate increase. Instead, they contend that the initial decision took the reasonable approach by permitting them to reduce rates to prevent diversion of this traffic. Such a course, it is argued, has been found permissible under section 13(4), citing in support, *Oklahoma Corp. Comm.* v. *United States,* 388 F. Supp. 4 (N.D. Okla., 1974).

Finally, the respondents claim that there is no controversy about applying the reporting and expenditure requirements of Ex Parte No. 305 to an intrastate rate increase. The Burlington Northern agrees to apply these restrictions to its revenue derived from an intrastate rate corresponding to Ex Parte No. 305. The Chicago, Milwaukee, St. Paul and Pacific is now exempt from these requirements.[3] Also, respondents maintain that a capital expenditure in another State can be as beneficial to Montana intrastate commerce as one in Montana. They also assert that in no State is there a requirement that Ex Parte No. 305 revenues be spent in that particular State or on specific projects. The respondents note that although the protestant Hoerner Waldorf purports to protect the interests of the Montana Public Service Commission, this State agency has filed no exceptions to the initial decision.

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[3] See orders dated December 4, 1975, and May 26, 1976, allowing the Chicago, Milwaukee, St. Paul & Pacific Railroad Company to use Ex Parte No. 305 funds collected during the period July 1, 1975, to December 31, 1976, for general operating purposes subject to conditions therein specified.

DISCUSSION AND CONCLUSIONS

The basic principles for relief under section 13(4) of the act are well established. See, for example, *Public Service Commission of Utah* v. *United States*, 356 U.S. 421, 425-426 (1958); and *King* v. *United States*, 344 U.S. 254 (1952). The following findings, supported by substantial evidence, must be made; (1) that existing intrastate rates are abnormally low and do not contribute a fair share of the railroads' revenue need, (2) that conditions surrounding the movement of intrastate traffic are not more favorable than those existing in interstate commerce, (3) that the rates cast an undue burden on interstate commerce, (4) that the increase order by the Commission in the intrastate rates would yield substantial revenues, and (5) that the increase would not result in intrastate rates being unreasonable and would remove the existing discrimination against interstate commerce.

In the instant proceeding the Administrative Law Judge has made all the necessary above findings supported by the evidence of record. The exceptions and arguments made by protestants do not rebut these findings. Protestants' argument that the absence of any evidence of damage or injury caused by the low intrastate rates is fatal to respondents' case, is without merit. Of the two types of discrimination forbidden by section 13(4) of the act, the respondents allege that the low Montana intrastate rates cause an undue, unreasonable or unjust discrimination against or undue burden on interstate commerce, not that preference or prejudice is caused between persons or localities. This type of discrimination alleged by respondents does not require proof of potential or actual damage. See *King* v. *United States, supra.* Therefore, respondents were not required to allege injury caused by a rate disparity to make a prima facie case.

Montana State protestants' argument that the financial need of the carriers should have little, if any, weight because the instant proceeding is not a general revenue proceeding is also without merit. We are investigating here whether the general level of intrastate rates should be increased to remove any undue burden on interstate commerce, and as the respondents indicate, proceedings of this nature are general revenue proceedings. See *Oklahoma Corp.*

Comm. v. *United States, supra.* The systemwide financial condition of the carrier is thus entitled to great consideration. *State Corp. Comm. of State of Kansas* v. *United States,* 216 F. Supp. 376, 380 (D. Kans., 1963), affirmed *per curiam,* 375 U.S. 15 (1963).

The Montana State protestants strenuously object to the respondents' comparison of present interstate rates on grain and related articles with the present and proposed intrastate rates for these commodities over similar distances. Yet, similar comparsions for other commodities were presented which also show that even after being increased by as much as the carriers seek, intrastate rates will be lower than the present interstate rates for like distances. When considered with the showing (1) that general transportation conditions for Montana interstate and intrastate traffic are substantially similar, and (2) that the intrastate rates would be increased by no more than the interstate rates have been by rate increases already authorized for application on interstate traffic, these comparsions indicate that the proposed general increase would not result in unreasonable intrastate rates.

Protestants' criticism of the taper theory and protestants' analysis of the relation of ton-mile earnings to distance for Montana interstate grain traffic does not convince us that the Administrative Law Judge erred in rejecting protestants' argument that intrastate rates are contributing a fair share to the revenues required by respondents. In a general revenue proceeding such as this, additional revenue to meet increased expenses must be obtained from all traffic as far as possible and regardless of present profitability when compared with other traffic. *Increased Freight Rates and Charges, 1972,* 341 I.C.C. 290, 330-331 (1972); *Increased Freight Rates, 1970 and 1971,* 339 I.C.C. 125, 189-190 (1971).

Protestant Hoerner Waldorf challenges the sufficiency of the respondents' showing of revenue need, but does so unpersuasively. Despite its assertions to the contrary, the respondents' evidence of revenue need is of the type required by this Commission in section 13(4) investigations. Compare *Arkansas Intrastate Frt. Rates and Charges—1972,* 349 I.C.C. 9 (1974). Also, any profit improvement from 1970 to 1973 does not diminish the carriers' present revenue need for a fair contribution from intrastate traffic.

Protestant Hoerner Waldorf insists that pulpwood chip traffic should be exempted from any intrastate rate increase approved in this proceeding. However, evidence concerning contribution to variable costs does not, as the repondents point out, establish that the present rates are at a maximum reasonable level nor that the proposed increases would be unreasonable. Nor does the percentage increase in the amount by which revenues exceed variable costs, which would allegedly result from these increases, make a case for unreasonableness. The profitability of the present rates when compared with other traffic is not relevant in a general revenue proceeding such as this. See *Increase Freight Rates and Charges, 1972, supra.* In its argument concerning less switching costs at origin, the protestant also fails to show why this factor would show that the proposed increase is unreasonable or that the conditions incident to intrastate transportation are not still substantially the same as those for interstate transportation.

Furthermore, protestant Hoerner Waldorf argues that any intrastate rate increase on pulpwood chip traffic is impermissible because it will result in a substantial diversion of this traffic to motor transportation and thus not yield substantial revenues. Since this is the only evidence of diversion of pulpwood chip traffic, we are convinced that from all traffic the intrastate rate increases sought here will yield substantial revenues. As for this one commodity, the protestant's analysis is based on current motor carrier rates which cannot be assumed will remain at the cited levels. Thus, we are not persuaded that the threat of lost traffic is as dire as the protestant maintains. The respondents wish to use their managerial discretion to adjust their rates in order to compete with motor transportation. We believe that they should be given this opportunity. This option is permissible under section 13(4) of the act. See *Oklahoma Corp. Comm.* v. *United States,* 388 F. Supp. 4 (N.D. Okla. 1974)

Although the initial decision did not deal with them, questions have been raised as to whether and how any intrastate rate increase corresponding to that approved for interstate traffic in Ex Parte No. 305 should be ordered. That general rate increase was conditioned on reporting requirements and spending restrictions designed to insure that rail service to the shippers will be improved. Where a railroad has shown sufficient cause, it has been exempted from these conditions. Up to 3 percent of the Ex Parte No. 305 increase was justified by the revenue needs of all railroads, including the respondents, resulting from increased material and supply costs, excluding fuel, for both interstate and intrastate traffic. Undeniably, fairness requires that Montana intrastate traffic should make an equivalent contribution to meeting these expenses. The remaining portion of the interstate increase was based on the revenue needed by the railroads, including the respondents, to alleviate deferred maintenance and delayed capital improvements. These problems affect intrastate as well as interstate traffic. Since the latter is now making its contribution to their solution, the former should do no less. Thus, we believe that section 13(4) forbids a disparity in rates by which intrastate traffic does not bear its fair share of the expense of reducing deferred maintenance and delayed captial improvements. Accordingly, any increase in Montana intrastate rates based upon corresponding interstate ex parte increases requires the same percentage spending requirements and reporting conditions to insure that intrastate revenue derived is spent for the above-designated purposes. The intrastate rate increase should continue as long as the interstate increase is in effect in Ex Parte No. 305. Where the Commission has exempted an individual railroad from these conditions for the interstate increase, it should also be exempted from those conditions to the intrastate rate increase.

It is implied in the arguments of protestant Hoerner Waldorf that Montana intrastate revenues should be spent only within Montana. Although the record in this proceeding does not furnish specific examples, deferred maintenance and delayed capital improvements are problems so pervasive in the railway system that we can reasonably assume that they exist within Montana. But, since the respondents have demonstrated that Montana interstate and intrastate traffic are intermingled, utilize the same equipment and receive substantially the same service, we are not convinced that out-of-State expenditures which may benefit Montana interstate traffic may not also benefit its intrastate traffic. Accordingly, we will not order that intrastate revenues from this portion of the increases should be spent only within Montana. Thus, we reject the arguments of protestant Hoerner Waldorf to allow the Montana Commission to use its expertise in deciding expenditures within Montana. Consequently, a separate report showing intrastate revenues and expenditures is not required by this Commission nor do we require such a report to be sent to the Montana Public Service Commission. Respondents' only obligation is to continue to report Ex Parte No. 305 interstate revenues and expenditures for deferred maintenance and delayed capital improvement to this Commission, and hereafter to the Montana Public Service Commission.

Protestant Hoerner Waldorf argues that for this Commission to apply its conditions on an intrastate increase usurps State authority.

We disagree. We have authority in this regard, pursuant to section 13(4) of the act based on the need to eliminate an unlawful burden on interstate commerce caused by the failure of intrastate traffic to contribute to solving these problems.

Respondent railroads have amply demonstrated a revenue need, showing that the transportation conditions of the Montana intrastate and interstate traffic are substantially similar, indicating that the costs of intrastate traffic is no higher than interstate traffic. We are convinced that the revenues generated under the present Montana intrastate rates are not contributing their fair share and are an undue burden on the railroad revenue needs, and that general increases in Montana intrastate rates are warranted under section 13(4) of the act.

ULTIMATE FINDINGS AND CONCLUSIONS

The interstate increases authorized in Ex Partes Nos. 295, 303, and 305 were based on the proven revenue needs of all the railroads, including the respondents. These revenue needs resulted from increased operating expenses which were incurred on both interstate and intrastate traffic. The respondents here seek from Montana intrastate traffic a revenue contribution to these operating expenses which approximates the interstate increases. Such a contribution has been recognized by the Commission as fair. See *Intrastate Freight Rates and Charges, 1969*, 339 I.C.C. 670, 675 (1971).

We find that:

1. The conditions incident to intrastate transportation of freight in Montana are not more favorable than conditions incident to interstate freight from, to, and through Montana.

2. The amounts and percentages by which the interstate freight rates between points in Montana and points in adjoining States were increased, as authorized in Ex Parte No. 295, Ex Parte No. 303, and Ex Parte No. 305, including the fuel cost surcharge formerly published in tariff X-301-D, are just and reasonable and do not result in rate levels that exceed maximum reasonable rate levels.

3. The present intrastate freight rates and charges in Montana are unjustly discriminatory against interstate commerce, are abnormally low, and are not contributing their fair share to the revenues required by respondents to enable them under honest, economical, and efficient management to provide adequate and efficient transportation service at the lowest cost consistent with the furnishing of such service, thereby accomplishing the purposes of the Interstate Commerce Act as set forth in the national transportation policy declared by the Congress, to develop and preserve a national transportation system. The burden thus cast upon interstate commerce is undue to the extent that the intrastate rates and charges are less than

they would be on the basis sought herein. The present intrastate rates and charges in Montana cause, and to the extent they are maintained in the future will cause undue, unreasonable and unjust discrimination against, and undue burden on, interstate commerce.

4. The establishment of increases in intrastate rates and charges as sought herein will remove such unlawfulness and will not result in unreasonable rates and charges, nor in rates or charges that are unreasonable in relation to interstate rates or charges. The increases will substantially increase respondents' revenue and will constitute no more than a fair proportion of respondents' total income.

5. The unlawfulness herein found to exist should be removed by applying to the Montana intrastate rates and charges the same respective increases as are maintained by the respondents on like interstate traffic between points in Montana and points in adjoining States. The increase of Montana intrastate rates and charges corresponding to the increase authorized in Ex Parte No. 305 should be conditioned on the same spending restrictions imposed by the Commission on that interstate increase for as long as they exist. A separate report showing intrastate revenues and expenditures is not required by this Commission nor do we require the filing of such a report with the Montana Public Service Commission. However, respondents shall be obligated to continue to file Ex Parte No. 305 interstate reports with this Commission, and to furnish a copy of said report to the Montana Public Service Commission. When the Commission has exempted a railroad from these conditions for the interstate increase, that railroad should also be exempted from the equivalent intrastate conditions. Also, this intrastate rate increase should continue only as long as the Ex Parte No. 305 rate increase.

6. This decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

The findings herein are without prejudice to the right of the authorities of Montana, or any other interested party, including any of the respondents, to apply for modification thereof, as to any individual intrastate rate or charge on the ground that such rate or charge is not related to the interstate rates or charges on like traffic in such a way as to contravene the provisions of the Interstate Commerce Act.

It is ordered, That the petitioning respondents in this proceeding according as they participate in the transportation be, and they are hereby, notified and required to cease and desist, within 60 days from the service date of this order, upon notice to the Interstate Commerce Commission and to the general public by not less than 10 days' filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act, and thereafter to refrain from practicing the unjust discrimination against, and undue burden on, interstate commerce, found in the foregoing decision, made a part hereof, to exist.

It is further ordered, That the respondents, according as they participate in the transportation be, and they are hereby, notified and required to establish, within 60 days from the service date of this order, upon not less than 10 days' notice to the Interstate Commerce Commission and to the general public by filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act, and thereafter, to maintain and apply for intrastate transportation from and to points in the State of Montana, rates and charges which shall not exceed the rates and charges found reasonable in the foregoing report.

It is further ordered, That for as long as they exist, the spending restrictions imposed by the Commission as conditions to the rate increase authorized in Ex Parte

No. 305, and any exemptions therefrom granted to individual railroads, shall also apply to the corresponding increase of Montana intrastate rates and charges; that this intrastate rate increase shall continue only as long as the Ex Parte No. 305 interstate increase; that a separate report showing intrastate revenues and expenditures is not required by this Commission nor do we require the filing of such a report with the Montana Public Service Commission; and that respondents shall be obligated to continue to file Ex Parte No. 305 interstate reports with this Commission and to furnish a copy of said report to the Montana Public Service Commission.

And it is further ordered, That if the Interstate Commerce Commission shall be notified by the Montana Public Service Commission within 30 days from the date of service of this decision that it, the Montana Public Service Commission, will promptly permit the increase required to remove the unlawfulness found in this decision to exist, this order shall be null and void, and of no effect.

APPENDIX

The statement of facts and the discussion and conclusions of Adminstrative Law Judge Paul S. Cross follow:

This is an investigation proceeding under section 13 of the Interstate Commerce Act concerning the lawfulness of certain Montana intrastate freight rates and charges. The investigation was instituted by order of the Commission dated November 21, 1974, in response to a joint petition filed August 21, 1974, by the common carriers by railroad operating within the State of Montana.[1] By order dated January 8, 1975, the matter was assigned for handling under modified procedure. Actively opposing the petition are the Montana Department of Agriculture, the Montana Consumer Counsel, and Hoerner Waldorf Corporation.

The Montana Department of Agriculture moved on January 29, 1975, to dismiss the investigation for lack of jurisdiction upon the ground that the State of Montana has primary jurisdiction in the matter. The Montana railroads replied on February 18, 1975, and by order dated March 11, 1975, the motion to dismiss was denied.

On February 18, 1975, the State of Montana's Consumer Counsel and Department of Agriculture requested a subpena to compel the production of a certain Rail Form A cost study relating to Burlington Northern, Inc., to which Burlington Northern replied. By order dated April 2, 1975, the request for subpena was denied.

Statements of fact and argument were filed under modified procedure, whereupon the State of Montana's Consumer Counsel and Department of Agriculture filed a joint motion to strike particular portions of the respondents' opening statement of fact and argument, generally alleging irrelevance and immateriality of the assailed portions. The material in question relates basically to respondents' revenue needs and is clearly relevant. The motion to strike is denied.

In response to various protestants' requests, the matter was referred to the Administrative Law Judge for oral hearing for the purposes of cross-examination of all witnesses submitting verified statements under modified procedure and to afford the respondents and protestants the opportunity of presenting rebuttal evidence responsive to the cross-examination. By petitions filed July 21, 1975, the respondents petitioned for reconsideration of the order directing hearing and for omission of an initial decision, to which the protestants replied. By order dated August 18, 1975, the petition for omission of initial decision and the petition for reconsideration of the order directing hearing were denied. That order, however, notes that a need for expedited action is demonstrated in the proceeding, and provides that any exceptions to the initial decision, if filed, will be considered by the Commission, Division 2.

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[1] Burlington Northern, Inc.; Chicago, Milwaukee, St. Paul & Pacific R. Co.; and Union Pacific Railroad Company, hereinafter called "respondents."

Oral hearing was held October 6 and 7, 1975 at Helena, Mont.[2] At the close of the hearing, briefs in the form of a proposed initial decision were requested. The entire record, including the briefs, has been considered. Substantial portions of the latter are adopted herein.

THE ISSUES

This investigation is instituted for the purpose of determining whether the intrastate rates and charges of the respondent Montana carriers caused, or will cause, by reason of the failure of such rates and charges to include increases in amounts corresponding to those permitted by this Commission for interstate transportation, any undue or unreasonable advantage, preference, or prejudice between persons or localities in intrastate commerce on the one hand, and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against, or undue burden on, interstate or foreign commerce. In particular, this proceeding concerns the prejudice or burden arising from the failure of the Montana intrastate rates and charges to reflect increases corresponding with those authorized by this Commission on interstate traffic in Ex Parte No. 295, *Increased Freight Rates and Charges, 1973*, 344 I.C.C. 589 (woodchips and whole grains); Ex Parte No. 303, *Increased Freight Rates and Charges, 1974, Nationwide*; and Ex Parte No. 305, *Nationwide Increase of Ten Percent in Freight and Charges*, including the X-301-D fuel surcharge as now incorporated in the X-305-series tariff.

BACKGROUND FACTS

This is the second section 13 investigation which respondents have sought with respect to intrastate Montana freight rates and charges in recent times. In docket No. 35863, respondents sought to secure the application of certain ex parte increases to and including so-called X-281-B. However, these issues were dismissed prior to hearing at respondents' request following an arrangement between respondents, the Public Service Commission of Montana, and various shipper interests which resulted in the raising of the general level of intrastate rates on nearly all traffic to the X-281-B level.[3]

Following the above agreement concerning the X-281-B increases, respondents sought to increase Montana intrastate freight rates and charges to the X-295 level. The Montana commission suspended this increase effective December 17, 1973, and held a hearing on February 19-23, 1974. On June 18, 1974, the Montana commission granted respondents' request as to all commodities except pulpwood chips and whole grains. Respondents challenge the lawfulness of those exceptions in this proceeding.

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[2] The parties agreed that certain witnesses were not required for cross-examination.

[3] A hearing ultimately was held in docket No. 35863 concerning respondents' unrelated petition to increase intrastate Montana rates on pulpwood chips. That was a single commodity issue not involving ex parte rate increases.

Respondents published tariff supplements containing the other intrastate Montana rate increases here at issue as follows:

Increase	Proposed effective date
X-301-A	April 25, 1974
X-301-C	May 28, 1974
X-303-A	August 9, 1974
X-305 (includes X-301-D)	August 18, 1974

Each of the above tariffs was suspended by the Montana commission pursuant to State law which provides that the suspended rate "shall be deemed approved and effective as filed" unless the Montana commission completes its hearing and issues a contrary order within 180 days from date of suspension. All of the above tariff supplements were withdrawn by respondents or canceled by the Montana commission prior to hearing after respondents advised that they would seek relief under section 13 in this proceeding.

The extent to which respondents request that intrastate Montana freight rates and charges be increased to reflect ex parte general revenue increases previously authorized by this Commission for interstate transportation is summarized in the following table:

Ex Parte No.	Amount of increase	Traffic commodities at issue
	Percent	
295-A	3.0	Pulpwood chips Whole grains
303-A	4.0	All
305-A (fuel surcharge)	3.3	All
305-A	10.0	All

RESPONDENTS' EVIDENCE

The respondents direct themselves to their need for an estimated $1,756,339 annual revenue increase that can result from a maximum application of the increases sought in this proceeding, assuming no diversion of traffic. The financial problems confronting the Montana railroads are discussed at length by their witnesses. It is particularly significant that from 1966 to 1973, the Montana railroads have increased their net property investment by about $363,500,000, generally reflecting the cost of new equipment. Through this same period, however, the net railway earnings have declined over $23 million under 1966. The Montana railroads' rate of return, while showing an improving trend since 1969, nevertheless continues on a level lower than that realized in 1966. Also of concern to them is the reduction in the rate of return from 3.11 percent in 1966 to only 2.39 percent in 1973 after the payment of fixed charges.

For the last 8 years, the Montana class I railroads' freight operating revenues show a general upward trend. However, despite that fact, increased operating expenses, payroll taxes, other taxes, and rents have nullified these revenue gains, and the net result is unsatisfactory earnings and the need for additional revenues.

Working capital for the Montana railroads is now a fraction of what it was in 1966. On the other hand, long-term equipment obligations have steadily increased. Respondents show that the costs of labor, materials and supplies, taxes, and necessary capital expenditures have increased greatly. The Montana railroads have had no relief from the recent steep increases in fuel costs.

The railroads believe that it is essential for them to take all possible steps to improve their financial posture. They regard the relief sought in this proceeding as an important step in that direction.

The respondents also submitted evidence showing that their interstate and intrastate freight is handled in substantially the same manner, and that the conditions incident to the intrastate transportation of freight in Montana are not more favorable than those incident to interstate transportation to, from, and through points in Montana. The comparative cost of handling Montana intrastate traffic is at least as great as that of handling interstate traffic within, to, and from Montana. The respondents' evidence shows that interstate and intrastate traffic are intermingled on the same trains and move over the same tracks and under the same supervision. The carriers operate no purely intrastate trains within the State of Montana, and the intrastate traffic is handled in the same type of cars, with the same locomotives as interstate traffic. Billing of interstate and intrastate shipments is handled by the same clerical forces, and switching is handled by the same switch crews. Intrastate traffic has a higher proportion of train tonnages in local trains than in through trains, and the traffic moves a relatively short distance in comparison with interstate traffic. Local trains generally handle far fewer cars and less tonnage than through freight trains.

As stated, intrastate traffic is more likely to move in local train service, on which operating crews are paid higher wages than crews employed in through train service. Overtime pay is greater on local trains than on through freight trains. Intrastate traffic, while not only producing a relatively shorter haul, necessarily has two terminal handlings within the State of Montana, so the expense of these functions must necessarily be spread over the relatively short intrastate haul.

Burlington Northern undertook a 1-month study for July 1973 for the purpose of demonstrating the relative cost of handling intrastate and interstate traffic in the State of Montana. It believes that, on the basis of current revenues, traffic and operations, that month is representative and an update would not materially affect the conclusions drawn from that study. The study concludes that the two crew wage costs per loaded car-mile on intrastate traffic is $144.72, or 126 percent greater than the interstate crew wage cost of $63.97 per loaded car-mile.

The respondents' exhibits show that handling of intrastate traffic costs at least as much and probably more than the handling of interstate traffic in Montana. They believe there is no justification from an operating standpoint for the existing rates now enjoyed by shippers and receivers of Montana intrastate rail traffic.

The respondents do not believe that there will be diversion from rail to other modes of common carrier transportation or private carrier carriage if the increases sought in this proceeding are authorized, but it would be the policy of respondents to adjust their rates where necessary to maintain markets.

Particular commodity rate comparison exhibits were submitted to show that the Montana rate structure, with all of the sought increases applied, will be no higher than comparable interstate rates moving the same kind of traffic. Based thereon, respondents conclude that the establishment of increases sought in this proceeding will not result in unreasonable rates and charges, nor rates and charges that are unreasonable in relation to interstate rates and charges. The following rate comparisons were made for representative commodities moving in Montana intrastate commerce:

SUGAR

The sought increase in the present intrastate rates on sugar will not result in rates at the same level as the present interstate rates, as the intrastate rates will continue to be lower. In this regard, a comparison is made of the present and sought intrastate rates with the present interstate rates on sugar for similar distances. The variance in the rates is caused, to some extent, by the Montana commission's action in restricting or denying increases in rates on sugar in Ex Partes Nos. 259 and 262 proceedings, but, in any event, the proposed intrastate rates are much lower than the existing interstate rates for corresponding distances.

For the year 1973, the Burlington Northern handled 1,685 interstate shipments of sugar from or to Montana, all of which included the applicable interstate increases. For the same period, the Burlington Northern moved 84 carloads intrastate in Montana with revenue amounting to $35,543. Based on 1973 figures, it is estimated that on the intrastate movement of sugar, Burlington Northern will lose $6,459 in revenue a year if it is unable to take the proposed increases.

SAW LOGS

During 1973, Burlington Northern transported 14,109 cars of saw logs from, to, and within Montana. Of this number, 13,555 cars moved intrastate, producing revenue of $988,227. A comparison of intrastate and interstate per-car rates on saw logs reveals that the interstate rates are substantially higher as compared to the present and sought intrastate level. Based on 1973 revenue, Burlington Northern's inability to assess the sought increases results in an estimated revenue loss of $179,612 a year.

CEMENT

The State of Montana contains two cement-producing origins. During the year 1973, Burlington Northern handled 4,644 cars of cement originating in Montana, of which 562 cars were intrastate, producing revenue of $255,619. A comparison of present and proposed intrastate rates on cement with interstate rates for similar mileages is presented. Here again, the intrastate rates at the proposed level hold a decided competitive advantage over the interstate rates. It is estimated that the failure of the Montana commission to grant the sought ex parte increases will deprive Burlington Northern of $46,460 per year revenue based on 1973 traffic and revenue.

PREPARED FEED (ANIMAL OR POULTRY)

Prepared feed, animal or poultry, produced 1,429 carloads from Montana origins for the year 1973. Of this number, 816 moved intrastate, producing Burlington Northern revenue amounting to $144,542. Of all commodities, the Montana commission is thought to have held this one down the most. In 11 revenue need proceedings, Ex Parte No. 256 through Ex Parte No. 305, the Montana commission granted 5 increases, 6 percent under X-265, 11 percent under X-267, 3 percent under X-281, 3 percent under X-295, and 2.8 percent under X-299. A comparison of rates applicable on intrastate shipments of prepared feed with interstate shipments for similar distances shows that even after applying all possible increases, the intrastate rates are still considerably lower than interstate rates. Based on 1973 revenue, Burlington Northern estimates that because of failure to secure the general increases X-301 through X-305, it will be deprived of approximately $26,272 revenue a year based on 1973 revenue.

GRAIN, GRAIN PRODUCTS, FEEDS AND RELATED ARTICLES

In this proceeding, in addition to Ex Partes Nos. 301, 303, and 305 increases, the repondents are also seeking the 3-percent Ex Parte No. 295 increases on whole grains and woodchips granted by the Interstate Commerce Commission but denied by the Montana commission in docket No. 6210, Order No. 4140, dated June 14, 1974.

Burlington Northern records indicate that during the year 1973, Montana produced and shipped via Burlington Northern, the following grains:

Wheat, 34,188 cars interstate with Burlington Northern revenue of $40,976,676 and 2,543 cars intrastate with revenue of $1,578,275.
Barley, 7,380 cars interstate with Burlington Northern revenue of ,936,006 and 229 cars intrastate with $95,954 in revenue.

A comparison of present and proposed intrastate rates on grain, grain products, feeds and related articles with interstate rates for similar distances shows that even after applying the increases here in issue, the proposed intrastate rates are still lower than the present interstate rates for like hauls.

Based on 1973 revenue, Burlington Northern estimates that by not being able to assess the four increases, there results an annual revenue loss of $363,650.

The Milwaukee Road's participation in the movement of Montana intrastate traffic has historically been, and continues to be, substantially less than the participation of the Burlington Northern, but evidence is submitted showing the number of carloads of principal commodities handled intrastate to Montana by the Milwaukee during 1973. That year is regarded as representative of the movement of commodities within the State of Montana and was presented because the figures for 1974 were not yet available. Total intrastate carloads were 3,292, producing freight revenue from Montana intrastate traffic of $578,218. It is the Milwaukee's opinion that its revenue will be increased by approximately $110,000, if the increased level of rates sought in this proceeding is granted.

The above figures do not include revenue from switching charges on intrastate traffic. The current charge on intrastate switching to Montana is 88 cents per net ton, with a minimum charge of $26.40 and maximum charge of $36.55. The Milwaukee received $14,328.43 for intrastate Montana switching in 1973. The sought level of charges, based on the 1973 switching revenues would increase this amount by approximately $4,248.

PROTESTANTS' EVIDENCE

Protestants criticize the respondents' calculation of cost increases associated with fuel consumption and fuel cost escalations. Upon recalculation, these protestants conclude the railroads have demonstrated only a 3.2-percent increase in rates necessary to offset fuel costs, rather than the 3.5 percent the railroads allege.

Protestants also contend that though the railroads rank 69th on a list of 70 industrial groups as measured by rate of return on net worth, the railroads in this proceeding increased their earnings per share from 1972 to 1974, even during a period of rapidly increasing prices. During the same period, other companies showed decreases in earnings per share, and the conclusion is drawn that the railroads' financial needs are not dire. These protestants also criticize the aggregation of financial statistics presented by respondents upon the ground that the figures are distorted by inclusion of the Union Pacific, which enjoys a relatively minor share of intrastate traffic in Montana.

The protestants also submit a cost study based on application of the Commission's Rail Form A. The study seeks to show that:

1. The present freight rates and charges on interstate shipments of grain from or to Montana now contribute revenues to ease the burden of Burlington Northern ranging between 2.0 and 2.7 cents per ton-mile.

2. The present freight rates and charges on interstate shipments of grain from Nebraska and North Dakota to the Pacific northcoast ports for export now contribute revenues to Burlington Northern in amounts less than 2.0 cents per ton-mile, and in one case as low as 1.27 cents per ton-mile.

3. Most of Montana's wheat shipments into the Spokane, Wash., area are inbound transit shipments and will ultimately move out on a transit balance rate with produces less than 2.0 cents per ton revenue.

4. The average revenue contribution made by all freight service provided by Burlington Northern during 1973 was 1.44 cents per ton-mile.

5. The present freight rates and charges on intrastate shipment of grain within Montana presently contribute revenues to Burlington Northern ranging from 2.2 cents to 3.0 cents per ton-mile.

6. Present Montana intrastate freight rates do not cast an undue burden on interstate or foreign commerce because in almost every instance the present ton-mile revenue generation and contributions made by Montana intrastate grain rates equals or exceeds the ton-mile contribution resulting from interstate or foreign commerce grain rates.

7. Montana's present intrastate grain rates without the addition of the sought increases, contribute an amount over variable costs equal to or greater than the amount of variable costs contributed by present interstate grain rates.

The ultimate conclusion is urged that Montana intrastate shippers are making a fair contribution to ease railroad burden in relation to the amount of contribution now paid by interstate or export grain rates.

Hoerner Waldorf Corporation owns and operates the only pulp and paper mill within the State of Montana, located at Schilling, which is approximately 12 miles west of Missoula. This mill is directly served by both the Burlington Northern and the Milwaukee Road. It is the only receiver of pulpwood chips moving under intrastate Montana rail freight rates and charges. Hoerner Waldorf Corporation opposes the requested rate increases in their entirety.

During calendar year 1974, protestant's Schilling mill received a total of 6,688 railcar loads of pulpwood chips, of which 5,196 cars or 78 percent moved under intrastate Montana rail rates and charges. Motor carrier transportation accounted for 70 percent of the mill's total pulpwood chip receipts during 1974.

Intrastate Montana rail movements of pulpwood chips to protestant's mill-generated gross revenues to respondents in excess of $900,000 during calendar year 1974. Based upon the same traffic volume, protestant calculates that the rate increases proposed by respondents in this proceeding would result in a 22-percent rate increase on pulpwood chips and would cost protestant approximately $206,597 if fully approved by this Commission and if no future diversion of traffic to a competitive mode of transportation occurs.

Protestant submitted a study of the variable costs applicable to intrastate Montana rail movements of pulpwood chips to protestant's Schilling mill. This study shows that the weighted average ratio of the present intrastate woodchip rates to the 1974 variable costs incurred by respondents for such movements was 128 for the Burlington Northern and 127 for the Milwaukee Road. In other words, protestant's study indicates that the present level of intrastate Montana woodchip rates is 28 percent above the Burlington Northern's variable cost and 27 percent above the Milwaukee Road's variable cost. In part, these figures are produced by using unit costs for switching and detention which are less than the systemwide averages for the Burlington Northern and the Milwaukee.

Protestant also notes that a separate rail revenue contribution study shows that the ratio of rate to cost for woodchips in the west-to-west territory is 88, or 12 percent below variable cost. By comparison, intrastate Montana rail pulpwood chip movements in 1974 made a total revenue contribution above respondents' variable cost of approximately $205,000. Thus, the $205,000 in increased revenues from intrastate woodchip movements sought by respondents could amount to a 100-percent increases in net contribution. Protestant argues that respondents' request is unreasonable.

Protestant also submitted evidence intended to show that, if any or all of the proposed increases here sought by respondents were made applicable to intrastate Montana woodchip movements, respondents' future revenues from this traffic would decline because a substantial portion of this traffic would be diverted to motor carrier transportation which is said to be available at a lower total cost than rail transportation at the increased rate levels. This evidence consists of the following:

1. Protestant's mill already receives some 70 percent of its total woodchip supplies by motor carrier transportation. Protestant owns and operates a fleet of 48 motor carrier chip trailers, and the mill is equipped to provide adequate end-dump unloading facilities to accommodate both end-dump railcars and truck trailers.

2. Motor carrier transportation is more attractive or competitive for woodchip origin points that are closer to the Schilling mill and a number of the intrastate rail woodchip movements to Schilling are less than 100 rail-miles.

3. There was a sharp drop is the volume of intrastate rail woodchip movements to Schilling in 1974, resulting from the diversion to motor carrier transportation of the substantial woodchip movements from Bonner, Mont., to Schilling because motor carrier transportation appeared more attractive from a cost point of view.

4. Protestant has agreements with three motor carriers at rates established under Montana authority. These agreements authorize motor carrier transportation from all intrastate rail origin points which protestant believes to be subject to diversion because of the rate increases here requested by respondent. There are no factors, such as equipment capacity, authorized highway payloads, fuel shortages, or cost of conversion at origin, that would prevent the prompt conversion of these origin points to motor carrier transportation.

5. Protestant offered a comparison of the cost per woodchip unit of moving woodchips from five intrastate rail origins to Schilling under the present and proposed rail rate versus available motor carrier rates and costs. Based upon this comparison, as well as upon the opinion of protestant's employees who have personal knowledge of the transportation conditions facing both protestant's Schilling mill and its suppliers at the five origin points in question, protestant concludes that the existing intrastate rail traffic from all five points would be diverted to motor carrier transportation if the rate increases here proposed by respondents were made effective.

6. Finally, protestant submitted exhibits showing the estimated impact which the proposed rate increase would have on the revenues earned by respondents from intrastate pulpwood chip movements, assuming that the five movements shown would be diverted to motor carrier transportation when comparative rate conditions make rail transport uneconomical. Under protestant's analysis, the diversion occurs at different rail rate levels for the five origin points. However, protestant's calculations indicate that because of diversion, the total revenues realized by respondents from all intrastate Montana woodchip traffic would be less under any one or more of the proposed increases, than the revenues received by respondents applying present intrastate rail rates to actual traffic volumes in both calendar year 1973 and calendar year 1974. Protestant's exhibits further indicate that the greatest revenue decline[4] would be incurred by respondents if the Commission authorizes all of the ex parte increases proposed by respondents in this proceeding.

Finally, protestant presents a lengthy criticism of the respondents' evidence submitted in this proceeding. On a general level, protestant criticizes respondents' ex parte or general revenue approach to seeking rate increases, arguing that this device has failed to improve the respondents' financial condition and has resulted in discrimination between commodities and between railroads. This witness urges that the Interstate Commerce Commission allow rate increases only to railroads which can demonstrate a revenue need and on commodities which are currently deficit or marginal contributors to profit.

More specifically, protestant criticizes respondents' evidence in this proceeding on the ground that respondents' revenue need evidence is based on a combination of expenses which bear no necessary relation to unit costs and the profitability of Montana intrastate traffic.

DISCUSSION AND CONCLUSIONS

Before State jurisdiction over intrastate rates may be superseded, such rates must be shown to be unlawful under section 13(4) of the act. It is well established that something more than a mere disparity between interstate and intrastate rates is necessary to sustain a finding of unlawfulness under section 13(4), and as expressly provided, only rates which amount to an *undue, unreasonable,* or *unjust* discrimination against, or *undue* burden on, interstate or foreign commerce are proscribed. It is, therefore, possible for intrastate rates to discriminate against, or constitute a burden on interstate commerce, without such burden or discrimination being undue, unjust, or unreasonable.

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[4] Using calendar year 1973 traffic volumes, respondents' total intrastate woodchip revenues would decline from $902,104 to $556,869 if the proposed rate increases were fully authorized. Using calendar year 1974 traffic volume, respondents' total revenues would decline from $952,460 to $769,860.

In this proceeding, the respondents have shown that there is a substantial disparity in rates, that a wide range of commodities move in intrastate commerce, and that the railroads' collective financial position and general revenue needs are such that they cannot realistically be expected to voluntarily pass up any opportunity to obtain additional revenue. The respondents also have shown, without the presentation of any specific cost evidence, that the handling of intrastate traffic generally is at least as costly as the handling of interstate traffic in Montana, and in all probability intrastate traffic is even more costly.

The subject intrastate rates cannot be found unduly burdensome in the sense that they require contributions from interstate revenues to cover direct losses from intrastate operations. However, the ex parte increases in Montana interstate rates were authorized by the Commission upon a satisfactory showing of a legitimate need therefor.

Considering the fact that intrastate traffic in Motana is at least as costly to handle as is interstate traffic, the railroads' general financial position and pressing need for additional revenues, it is reasonable to conclude that the maintenance of Montana intrastate freight rates at lower levels than authorized and charged for corresponding movement of interstate traffic in Montana, results in unjust discrimination against, and constitutes an undue burden on interstate commerce.

Protestants, of course, insist that revenue from Montana intrastate traffic already meets a fair share of respondents' costs. However, the fact that ton-mile earnings or contribution over variable costs on Montana intrastate traffic may be greater than the ton-mile earnings or contribution over variable costs on interstate woodchip or grain traffic, or the respondents' interstate traffic as a whole, does not demonstrate that the present Montana rates cannot present an undue burden on interstate commerce. The protestants' exhibits comparing ton-mile earnings demonstrate no more than the well-established taper principle of ton-mile earnings. That is, they prove that generally ton-mile earnings decrease as the length of haul increases. Acceptance of protestants' arguments that ton-mile earnings should approach equality after variable costs are removed from earnings regardless of length of haul would destroy the taper principle. As even the protestants admit, that would not be in the best interest of western shippers.

Beyond the variable cost studies, there is no basis upon which to find that the proposed intrastate rates would be excessive or unreasonable. However, Hoerner Waldorf's evidence to the effect that application of any rate increase on woodchips moving in Montana intrastate commerce would result in diversion to motor carriage does present a hard issue. Protestant already uses motor carriage to a substantial extent. Indeed, the motor carrier share of Hoerner Waldorf's woodchip movements increased in 1974, notwithstanding, the absence of rail rate increases during that year. Further, Hoerner Waldorf already owns a fleet of trailers, and it is apparent that this shipper is in a position to make good its threat to divert its present rail intrastate woodchip traffic to private or for-hire motor carriage. Nonetheless, motor carriers are not immune to cost increases and respondents' proposed increased intrastate rates may be more competitive than pictured by protestant. More importantly, the proposed higher intrastate rates will not leave Hoerner Waldorf without adequate alternative transportation service. In no way will the proposed increased charges diminish the ability of protestant to play-off motor and rail carrier against each other in order to obtain the lowest possible rates. In this regard, respondents indicates that they will make competitive downward adjustments in their charges as required and, in the view of the Administrative Law Judge, the respondents, for the purposes of this proceeding, should have the freedom to compete for woodchip traffic at rates which this traffic reasonably will bear.

In summary, the Administrative Law Judge finds no basis upon which to conclude that Montana intrastate woodchip or Montana intrastate grain traffic is exempt from the increased costs and expenses and attendant revenue needs which resulted in the Commission's findings of revenue needs in Ex Partes Nos. 295, 303, and 305, or which would allow the Commission to find that the revenue needs of respondents should not be borne in fair proportion by their traffic. In this regard, respondent's make out a prima facie case showing a general revenue need and a burden on interstate commerce and are not obliged in a general revenue proceeding such as this to present detailed cost evidence concerning individual commodities. Protestants have been given a fair opportunity to show why certain or all Montana traffic should be exempted from the general increases but submit insufficient evidence for that purpose. It is concluded that the respondent Montana railroads demonstrate the burden forbidden by section 13(4) of the act and are entitled to the relief they seek. The revenue burden forbidden by section 13(4) should be eliminated by application of the Ex Partes Nos. 295, 303, and 305 increases (including the X-301-D surcharge) on all classes of Montana intrastate traffic.

EX PARTE NO. 241

INVESTIGATION OF ADEQUACY OF RAILROAD FREIGHT CAR OWNERSHIP, CAR UTILIZATION, DISTRIBUTION, RULES AND PRACTICES

Decided December 28, 1976

Upon further consideration, Car Service Rule 16 modified.

James I. Collier, Jr., for petitioner.

REPORT OF THE COMMISSION ON FURTHER CONSIDERATION

MURPHY, *Commissioner:*

In the prior report, 335 I.C.C. 264 (1969), as modified in 335 I.C.C. 874 (1970), it was found that the Nation's railroads as a group lacked an adequate freight car supply and that they had failed to furnish adequate freight car service. In order to alleviate the problem, certain mandatory car service rules, including Car Service Rule 16, were prescribed so as to encourage more efficient operating practices. The proceeding was held open and the carriers allowed to petition the Commission to further supplement the car service rules if the need arose. On May 5, 1976, the Association of American Railroads (hereinafter referred to as the association or petitioner) filed a petition and verified statement seeking modification of Car Service Rule 16.

Car Service Rule 16 governs the handling of freight cars in assigned service. The present rule and proposed modification appear in the appendix hereto. Rule 16 provides, in general, that specified freight cars may be assigned to a shipper for its exclusive use provided certain conditions are met. Paragraph (A)(3) of the rule provides that cars assigned in accordance with the rule must remain and be treated as assigned until the shipper or owning railroad notifies the other and the originating roadhaul carrier "in writing at least ten (10) days in advance that such assignment is modified or cancelled."

The petitioner advises this Commission that over the years the 10-day notice requirement before a car can be released from an assignment has proven to be burdensome upon the parties involved, when immediate changes in assignments were necessary, and has resulted in wasted car-days and poor car utilization. The association proposes to modify paragraph (A)(3) of rule 16 so as to only require 1 day's written notice rather than 10 days. Furthermore, it proposes that paragraph (A)(3), which now allows only the shipper or owning railroad to modify or cancel an assignment, be amended so that the originating road-haul carrier(s) and/or pool operator would also have the right to modify or cancel an assignment if their need for assigned cars decreases. Petitioner further indicates that it would be the responsibility of the party initiating the modification or cancellation to notify the other interested parties.

The association also recommends that paragraph (D) of rule 16 be modified. Paragraph (D) states that "assigned cars are exempt from Car Service Rules 1 and 2 at initial loading stations."[1] Petitioner explains that assigned cars are generally not handled in accordance with Car Service Rules 1 and 2 at any locations. After unloading, assigned cars are normally returned empty to the point of assignment by the reverse route of the loaded movement. These empty movements are frequently not in accordance with rules 1 and 2. Therefore, petitioner declares that the proposed modification of paragraph (D), which unconditionally provides that "assigned cars are exempt from Car Service Rules 1 and 2," without any mention of a location restriction, takes the above situation into account and clarifies the rule.

Petitioner represents substantially all of the class I railroads, and also many of the class II railroads. Most, if not all, are subject to the car service rules prescribed in the prior decisions in this proceeding. The membership was polled by petitioner before the considered proposal was submitted to the Commission to determine whether the proposal had membership support. Of a total of 1,538,216 votes, based on the revenue freight cars owned by the carriers, 1,449,524 votes were cast in favor of the proposal, or 94 percent, 25,692 votes were cast against the proposal, and 63,000 votes were not cast. The instant petition was served on all parties participating in this proceeding, and no responses have been received thereto.

On the record we believe that the proposed modifications would overall operate in the public interest. However, the petitioner's proposed modification to paragraph (A)(3) is unacceptable as written and apparently fails to meet petitioner's expectations. As indicated earlier, the petitioner states that under paragraph (A)(3) it would be "the responsibility of the party initiating the modification or cancellation to notify the *other* interested parties." Paragraph (A)(3), as proposed, does not explicitly provide for this. As such, we believe that further modification of paragraph (A)(3) is required, so as to read as follows:

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[1] See appendix G of 335 I.C.C. 264 for Car Service Rules 1 and 2.

> When cars are assigned in accordance with this Rule, they shall remain and be treated as assigned cars until the shipper, originating road-haul carrier(s), pool operator or owning railroad serves notice on each of the remaining parties in writing at least one (1) day in advance that such assignment is modified or canceled.

Furthermore, modification of paragraph (A)(3) requires a change in the reporting requirement found in the second sentence of paragraph (C) of rule 16 which states that "Each carrier assigning such cars shall advise the Operating-Transportation Division of the Association of American Railroads of any change in assignment not later than the last working day of the month in which change occurred." Because of the possibility that assignments could take place at the end of the month on a nonworking day, thereby not allowing sufficient time for the carrier to advise the association of changes in assignments, we find that the second sentence of paragraph (C) should be amended to read as follows:

> Each carrier assigned such cars shall advise the Operating-Transportation Division of the Association of American Railroads of any change in assignment not later than the last working day of the month in which change occurred, except when a change in assignment occurs on the last two days of the month, then notice of change shall be as soon as possible, but not more than 5 days after any change in assignment.

Our modification to paragraph (A)(3) and (C) are relatively minor and consequently we do not expect opposition from any of the parties to this proceeding. However, if any of the parties to this proceeding are opposed to our modification of petitioner's proposed paragraph (A)(3) and our modification to paragraph (C), we will entertain their petition for reconsideration.

We note that ordinarily exceptions to the Car Service Rules for the purpose of improving car supply and utilization, increasing availability of cars to their owners, improving the efficiency of railroad operations, or alleviating inequities or hardships, may be authorized by the Director or Assistant Director of the Bureau of

Operations, and that a formal proceeding need not be initiated. See Car Service Rule 19, *Investigation of Adequacy of Freight Car Ownership*, 335 I.C.C. 874, 876 (1970). Because petitioner herein seeks a change in the wording of Car Service Rule 16, and not merely an exception from such rule, the petition for modification is procedurally proper. Our objective is to encourage more efficient operating practices in the assignment of cars and we believe petitioner's proposal, as modified herein, will further achieve this objective. The record for the reasons stated in the original report, 335 I.C.C. 264, remains open for possible further modification or prescription. This Commission views any change of the Car Service Rules with careful scrutiny, especially Car Service Rule 16, since the assignment of cars, if abused, can have a prejudicial effect on the small shipper and can result in oversubscription of cars or wasted car-days. Furthermore, Car Service Rules are promulgated by the Commission and the carriers cannot effect such changes without prior Commission approval.[2]

We find that Car Service Rule 16, set forth in appendix G to the report, 335 I.C.C. 264, at pages 353-354 thereof, should be modified as proposed by petitioner with the exception of paragraph (A)(3) and paragraph (C) which shall be modified as set forth hereinabove.

This decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

An appropriate order of modification will be entered.

COMMISSIONER BROWN did not participate.

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[2] It appears that Car Service Order No. 1112, *Railroad Operating Regulations for Freight Car Movement*, served October 3, 1972, authorized a storage charge of $5 per car per day or fraction thereof for cars assigned to the exclusive use of a shipper. Subsequently, a smiliar provision was published by the rail carriers in their Demurrage Tariff I.C.C. H-59, Rule 5, Section D, with the additional provision that assigned cars could be released by the assignee on 1 or more days after written notice. This provision, which currently exists, was contrary to the Commission's Car Service Rule 16 requiring 10 days' minimum notice, and was improperly published without prior Commission approval. The Commission disapproves of such unilateral actions. While the proposed change to a minimum of 1 day's notice of assignment in Car Service Rule 16 is compatible with Rule 5, Section D of Tariff I.C.C. H-59, in regard to minimum notice time required for assignment, the carriers are still obligated to amend rule 5, section D, in accordance with rule 14(f) of Tariff Circular 20, by supplement effective on not less than 10 days' notice to the Commission and the public.

APPENDIX

Rule 16, code of car service rules and interpretations-freight

Present	*Proposed*
RULE 16[1]	RULE 16
(A) When, after the effective date of these rules, specific cars covered by CSD 145 and 435 series are assigned to a shipper for his exclusive use, such assignment shall be made subject to the following conditions:	(A) No change.
1. Shipper must request in writing of originating road haul carrier(s) assignment at least ten (10) days before their intended use of a specific number of cars. If originating carrier(s) agrees to such assignment but desires other road haul carriers to participate in assignment, it will advise shipper accordingly and will make request on such other carriers. A road haul carrier may assign cars but must have the concurrence of the originating carrier which may or may not be a switching carrier.	1. No change.
2. Pools of assigned cars including cars of ownership other than the originating road haul carriers may be expanded only upon the acceptance by the originating road haul carriers.	2. No change.
3. When cars are assigned in accordance with this Rule, they shall remain and be treated as assigned cars until the shipper or owning railroad notifies the other and the originating road haul carrier(s) in writing at least ten (10) days in advance that such assignment is modified or canceled.	3. When cars are assigned in accordance with this Rule, they shall remain and be treated as assigned cars until the shipper, originating road haul carrier(s), pool operator or owning railroad serves notice that such assignment is modified or canceled. One day written notice is sufficient.[1]
(B) Assigned cars shall not be held empty enroute to loading point, except as follows:	(B) No change.
(a) Upon written instructions of assignee.	
(b) When assignee cannot immediately accept on arrival at loading point and	

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[1] Modified in the Commission report herein.

cars cannot reasonably be held on other tracks at loading points. (c) For necessary repairs (not cleaning).	
(C) The present and future assignment by a carrier of specific cars for the exclusive use of a shipper at a particular point shall be reported by such carrier to the Operating-Transportation Division of the Association of American Railroads by car initial, number, car type code and specific assignment. Each carrier assigning such cars shall advise the Operating-Transportation Division of the Association of American Railroads of any change in assignment not later than the last working day of the month in which change occurred. The Operating-Transportation Division of the Association of American Railroads will maintain a current record of cars assigned, and distribute such information to car owners assigning cars to a specific shipper at each location, as well as to the roads originating traffic from such assignment, including originating switching line serving the shipper involved. The foregoing provisions of this paragraph shall not apply when all cars assigned to the exclusive use of a shipper at a particular point are system cars of a single road haul carrier serving the shipper at such point.	(C) No change.
(D) Assigned cars are exempt from Car Service Rules 1 and 2 at initial loading stations.	(D) Assigned cars are exempt from Car Service Rules 1 and 2.

TITLE 49 - TRANSPORTATION
CHAPTER X - INTERSTATE COMMERCE COMMISSION
SUBCHAPTER A - GENERAL RULES AND REGULATIONS
PART 1033 - CAR SERVICE
SECTION 1033.16 - CARS FOR SHIPPERS' EXCLUSIVE USE
(Rule 16)

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D.C., on the 28th day of December 1976.

Ex Parte No 241

INVESTIGATION OF ADEQUACY OF RAILROAD FREIGHT CAR OWNERSHIP, CAR UTILIZATION, DISTRIBUTION, RULES AND PRACTICES

(Modification of Car Service Rule 16)

It appearing, That in the report herein, 335 I.C.C. 264, decided August 21, 1969, as modified in 335 I.C.C. 874, Car Service Rules were prescribed for mandatory observance, including rule 16 concerning the assignment of cars;

It further appearing, That by petition filed on May 5, 1976, the Association of American Railroads seeks modification of the said Car Service Rule 16, whereby the present 10-day notice requirement before a car can be released from an assignment would be amended so as to require only 1 day's written notice, and that other modifications be made for purposes of clarification and efficiencies in assignment of cars; and that said petition was served upon all parties to this proceeding; and that no replies thereto have been received;

And it further appearing, That on the date hereof, the Commission entered its report on further consideration finding that the petitioner's proposed modification of paragraph (A)(3) of rule 16 is unacceptable and requires further modification by the Commission for clarification purposes and that modification of paragraphs (C) and (D) is also warranted; and that the proposed modifications as amended will be in the overall public interest; therefore,

It is ordered, That the said Car Service Rule 16, set forth in appendix G to the report, 335 I.C.C. 264, at pages 353-354, be, and it is hereby, modified, effective January 31, 1977, by substituting in lieu of rule 16, paragraphs (A)(3), (C), and (D) the following:

(A) (3) When cars are assigned in accordance with this Rule, they shall remain and be treated as assigned cars until the shipper, originating road haul carrier(s), pool operator or owning railroad serves notice on each of the remaining parties in writing at least one (1) day in advance that such assignment is modified or cancelled.

(C) The present and future assignment by a carrier of specific cars for the exclusive use of a shipper at a particular point shall be reported by such carrier to the Operating-Transportation Division of the Association of American Railroads by car initial, number, car type code and specific assignment. Each carrier assigning such cars shall advise the Operating-Transportation Division of the Association of

American Railroads of any change in assignments not later than the last working day of the month in which change occurred, except when a change in assignment occurs on the last two days of the month, then notice of change shall be as soon as possible, but not more than 5 days after any change in assignment. The Operating-Transportation Division of the Association of American Railroads will maintain a current record of cars assigned, and distribute such information to car owners assigning cars to a specific shipper at each location, as well as to the roads originating traffic from such assignment, including originating switching line serving the shipper involved. The foregoing provisions of this paragraph shall not apply when all cars assigned to the exclusive use of a shipper at a particular point are system cars of a single road haul carrier serving the shipper at such point.

(D) Assigned cars are exempt from Car Service Rules 1 and 2.

And it is further ordered, That notice of this order shall be given to the general public by depositing a copy thereof in the Office of the Secretary of the Commission at Washington, D.C., and by filing a copy with the Director, Office of the Federal Register.

No. 36304

PHILIPP BROTHERS DIVISION OF ENGELHARD MINERALS & CHEMICALS CORPORATION v. THE AKRON, CANTON & YOUNGSTOWN RAILROAD COMPANY, ET AL.

Decided January 6, 1977

Assailed bulk rates on molybdenum concentrates, from San Manuel, Ariz., to Winslow Junction, N.J., found to be unreasonably high. Reparation awarded for all shipments between June 1, 1972, and January 12, 1974. Proceeding discontinued.

John J. C. Martin for complainant.
Charles W. Burkett and *John MacDonald Smith* for defendants.

REPORT AND ORDER OF THE COMMISSION

DIVISION 2, COMMISSIONERS HARDIN, O'NEAL, AND CHRISTIAN

BY THE DIVISION:

Exceptions to the Administrative Law Judge's initial decision were filed by both complainant and defendants. Defendants are 11 railroads which moved 39 bulk carloads of molybdenum concentrates for Philipp Brothers Division of Engelhard Minerals & Chemicals Corp. (complainant) from San Manuel, Ariz., to Winslow Junction, N.J., between June 1, 1972, and January 12, 1974, inclusive. Our conclusions differ, in part, from those of the Administrative Law Judge.

The 39 shipments involved moved under rates in several separate tariff items. Defendants assessed freight charges on 23 shipments dispatched prior to May 8, 1973, on the basis of 60,000-pound rates published in item 2115 series of Transcontinental Freight Bureau Tariff 6-E, I.C.C. No. 1783. Charges on 14 shipments dispatched on or after May 8, 1973, and before December 29, 1973, were based on combinations constructed over Reading, Pa., made applicable by item 1832 series of Transcontinental Freight Bureau Tariff 6-E, I.C.C. No. 1783, and by item 27420 series of Uniform Freight Classification Nos. 10 and 11, I.C.C. Nos. 6 and 7, at class 27 1/2. Defendants assessed charges on two shipments dispatched on and after December 29, 1973, on the basis of a combination of charges made applicable by item 692.5 series of Transcontinental Freight Bureau Tariff 6-E, I.C.C. No. 1783 and by item 27420 series of the Uniform Freight Classification. The rate to Reading in item 1832 series is subject to a minimum weight of 80,000 pounds. The rating of class 27 1/2 provided in item 27420 series of the classification is applicable only on concentrates which have been released to value not exceeding 5 cents per pound. Effective October 25, 1973, item 692.5 series was amended to provide rates on molybdenum concentrates, in bulk, from San Manuel to points near Winslow Junction, such as Reading.

Complainant was not aware of the existence of item 1832 series until April 1973 and it was not until May 10, 1973, that complainant requested that Winslow Junction be included as a destination in item 1832 series. This request was granted, effective February 25, 1974. Thirteen shipments moved after that date, between February 27, 1974, and December 12, 1974, inclusive, though it is not known under what tariff item they moved. Charges on these later shipments are not herein in issue.

Complainant's argument that the rates charged by defendants on shipments prior to and including January 12, 1974, are unreasonable is based on a comparison of the rates charged complainant (the applied rates) and the 110,000-pound bulk rate (item 692.5 series, T.C.F.B. Tariff 6-E, I.C.C. No. 1783) at which defendants offered to transport the same commodity between the same point of origin and points near the same destination (the comparison rate). Complainant submitted a cost study showing that the rates charged returned as much as $114 in excess of each $100 of fully allocated costs, while the comparison rate returned as much as $40 over these costs.[1] Complainant asked that reparations be awarded in the amount of the difference between what defendants charged on the 39 shipments and the charges that would have been applicable if the comparison rate had been applied. Furthermore, complainant asked that item 692.5 be specified as the basis of rates on future shipments.

For their part, defendants argued: (1) that the applied charges fell within the zone of reasonableness; (2) that the rate comparison was of negligible value because a similarity of circumstances under which the two rates had been established was not shown; (3) that the revenue/costs ratio which complainant had calculated was unduly high since the calculations were based on heavily loaded shipments; and (4) that there was no basis for specifying future rates since the movement was nonrecurring.

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[1] We disagree with the conclusions of the Administrative Law Judge, who found these amounts to be $109 and $39 over fully allocated costs, respectively. However, we do not find this error material to the result.

The Administrative Law Judge found that defendants had offered no evidence that the rate charged was within the zone of reasonableness; that there was an "identity of circumstances" between the applied and comparison rates; and, by comparing the rates, determined that the applied rate was unreasonably high. However, he also found that the rate was not unreasonable *ab initio,* because the carrier could justifiably charge a higher rate for new traffic—these being the first shipments made by complainant over these routes—and because complainant should have apprised the carrier that the movement would be massive. Furthermore, the Administrative Law Judge concluded that, after information of the movement's permanence was received, defendants had a grace period during which to act on the information. Accordingly, reparations were awarded complainant on the basis of the difference between the charges that would have been paid under the applied and comparison rates on the 39 shipments between October 25, 1973, and January 12, 1974, inclusive. Lastly, the Administrative Law Judge found that it was unnecessary to specify a future rate for the shipments since the movements had terminated and there was no indication that they would resume in the future, the last shipment from San Manuel to Winslow Junction having been made December 28, 1974.

Complainant excepts on the grounds that the applied rates should have been declared unreasonable *ab initio,* that reparations should have been awarded for all shipments, and that a future rate should have been prescribed. Defendants also except, claiming, *inter alia,* that the Administrative Law Judge incorrectly found that the applied rates are unreasonable.

DISCUSSION AND CONCLUSIONS

Defendants maintain that the Administrative Law Judge erred in finding that complainant pays more to ship from San Manuel to Winslow Junction than other shippers do on the same product over the same route. Defendants refer to the testimony of a witness who stated that if other shippers' movements of molybdenum stopped off in Reading, Pa., for roasting, and then continued on to Winslow Junction, their costs would be equal to the complainant's, who ships directly to Winslow Junction for roasting, but must pay a combination rate involving shipment from San Manuel, Ariz., to Reading, Pa., and from there to Winslow Junction, N.J. Defendants' point appears to be that complainant's competitive position is not infringed upon by the rate.

This objection fails simply because, while infringement of competitive position bears on the issue of undue preference and prejudice, this is not at issue here. Complainant charges only that the rate is unreasonable. Defendants also object that there is no indentity of circumstances between the applied rates and the comparison rate, other than similar mileage; and thus, that comparison is inappropriate. However, there is ample evidence of record of the similarity of the commodity shipped, the point of origin, the destination territory, and the route to justify a finding of substantial identity.

Defendants assert that the rates are within the zone of reasonableness since they exceed the cost of service and are less than the value of the service to the shipper. No evidence indicating the value to the shipper is of record, except the fact that the shipper was originally willing to pay the charges necessary to have his goods transported. This, however, is insufficient evidence of value since it is tantamount to arguing that any price which a carrier can exact from the shipper is reasonable. If the mere fact of payment were sufficient to put a rate within the upper limits of reasonableness, no action based on an unreasonably high rate could ever be maintained once charges assessed on a shipment of goods was paid.

Defendants also except to the Administrative Law Judge's comment that they offered no explanation of the difference between the rates for shipment of the same commodity. Defendants' only reply is that the rates were derived through a standard procedure. While this may help to establish a lack of bad faith on the carriers' part, it does not explain the results of the carriers' procedures, i.e., the two disparate rates.

Defendants contend that complainant should not be allowed reparation because it knew of the comparison rate at the time it requested that its destination be added to a third tariff item, and did nothing to have the comparison rate applied to it at that time. Defendants argue that since complainant thought it would be "easier" to be added to the third item than to the tariff item containing the comparison rate, it should now be precluded from using the comparison rate to demonstrate unreasonableness.

This argument is misguided. The fact that complainant found it easier to have its destination added to one tariff item than to the other should not preclude it from claiming that the rate of the item to which they were not added is unreasonable. Moreover, there appears to be no detrimental reliance on defendants' part, and thus, waiver seems to be inappropriate. Short of this, we see no way in which complainant's choice not to avail itself of the comparison rate earlier has any bearing on this proceeding.

With respect to complainant's contention that the Administrative Law Judge erred in failing to find the applied rate unreasonable *ab initio*, we observe that his basis for so finding is not clear. From an analysis of the decision it appears that any one of three rationales might have been intended to justify the finding that the rate was not unreasonable from the inception of the movement. These are: complainant's failure to apprise defendant that the movement was to be massive, the fact that the movement was new, and laches.

To the extent it rests upon complainant's failure to apprise defendants of the size of the movement, the Administrative Law Judge's decision cannot be upheld. Complainant is entitled by statute to a reasonable rate, and that entitlement cannot be conditioned on it giving the carrier information relating to the size of the movement. The only possible utility such information could have is to allow the carrier to lower its rate if it so desires. However, whether the shipper has furnished the carrier an opportunity to make a proper rate adjustment prior to the complaint is irrelevant to the shipper's right to a just and reasonable rate. *International Minerals & Chem. Corp., v. A., T. & S.F. Ry. Co.*, 303 I.C.C. 603, 606 (1958).

If the failure to find the rates unreasonable *ab initio* rests on whether the movement was new, rather than established, the finding is still incorrect. There is no authority for the proposition that a higher rate may be charged for the shipments in a movement merely because the movement has recently commenced. Such a doctrine would mean that rates should customarily be lowered as the shipments moving under them continue. Furthermore, to the extent the Administrative Law Judge's use of the term "new movement" can be equated with a movement which is irregular or low volume, we note that there is no basis in the record for distinguishing that portion of the movement before October 25, 1973, from that after that date, on which the rate was found to be unreasonable. Shipments averaged two per month both during the 17 months before October 25, 1973, and during the 2 1/2 months immediately after that date with which this proceeding is concerned. During the entire period the weight of any shipment never varied from 120,000 pounds by more than 6,000 pounds.

Insofar as the Administrative Law Judge's holding is based on laches, it is noted that the passage of time between the inception of the movement and October 25, 1973, is insufficient by itself to invoke that doctrine. For laches to apply, it must also be inequitable to allow recovery. *Seaboard Coast Line R. Co.* v. *U.S.*, 283 F. Supp. 866, 869 (E.D. Va. 1968); *Peters Mill Co.* v. *Director General*, 129 I.C.C. 331, 332 (1927). No inequity appears in this proceeding.

Though it does not appear in the Administrative Law Judge's discussion, another rationale might be advanced for the failure to find that the applied rates were unreasonable *ab initio*. The comparison rate did not apply to shipments in bulk until item 692.5 series was amended on October 25, 1973. Since it could not have been applied to the shipments in this case before October 1973, it could be argued that the comparison rate is not strong evidence of the unreasonableness of the applied rate before that time. However, the comparison rate is at least some evidence of unreasonableness before its effective date as a bulk provision. This conclusion is buttressed by the fact that the same rate per 2,000 pounds was maintained both before and after the item 692.5 series was made to apply to shipments in bulk. Thus, it seems likely that if the comparison rate had applied to bulk shipments before October 1973, it would have applied at the same rate as the current comparison rate. It is, therefore, our conclusion that the comparison rate does furnish sufficient evidence of the unreasonableness of the applied rates to enable them to be declared unreasonable *ab initio*. Moreover, it would be illogical to declare that the applied rates were unreasonable after October 1973 but reasonable before that time, since all the applied rates, both before and after October 1973, exceeded the comparison rate. This is particularly true where, as here, many of the charges made before October 1973 were based on rates which are far higher than the rates used after that date.

Since the decision not to find the rates unreasonable from their inception is not legally or factually supportable, we find that those rates are unreasonable for *all* shipments of molybdenum concentrates involved in this proceeding. We therefore find it unnecessary to discuss complainant's other exceptions relating to the failure to declare the rates unreasonable *ab initio*, and the improper allowance of a grace period during which to absorb information.

Complainant also argues that the Administrative Law Judge erred in refusing to prescribe future rates, based on his finding that there was little likelihood that the movement would resume. Complainant contends that *Minnelusa Oil Corp.* v. *Continental Pipe Line Co.*, 258 I.C.C. 41, 57 (1944), directs that future rates should be prescribed whenever the transported commodity is still produced at the point of origin, as in this case.

We agree with the Administrative Law Judge that future rates should not be specified. We note that there is no claim that any shipment has moved over the involved route since December 1974 and that the complainant holds out only the "possibility" that there will be a future movement. Since it seems unlikely that traffic will move under this rate, prescription of a rate for the future is inappropriate.

FINDINGS

We find that the rates assessed by defendants for the line-haul transportation of shipments made between June 1, 1972, and January 12, 1974, inclusive, were unjust and unreasonable, and that complainant is entitled to reparations in the amount that the charges assessed and collected exceeded the sums which would have been paid had the railroads included Winslow Junction within the ambit of item 692.5 series on a basis equal to Syracuse, N.Y., Reading, Pa., and Robesonia, Pa., and, therefore, that complainant is entitled to reparation in the amount of $50,782.33, with interest amounting to 4 percent annually.

We further find that it is not necessary or proper to specify future rates.

And we further find that this decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

It is ordered, That the defendants pay reparations of $50,782.33 with interest amounting to 4 percent annually, to the complainant.

It is further ordered, That the proceeding be, and it is hereby, discontinued.

INVESTIGATION AND SUSPENSION DOCKET NO. M-28872

GENERAL INCREASE—JANUARY, 1976, UNITED PARCEL SERVICE

Decided July 29, 1976

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1. Proposed increases in freight rates in excess of 3 percent found not shown to be just and reasonable.
2. Suspended scheduled ordered canceled without prejudice to filing of new schedules providing for 3-percent increases.
3. Proceeding discontinued.

Everett Hutchinson, S. Harrison Kahn, and *Irving R. Segal* for respondents.

E. Bruce Butler, Daniel J. Sweeney, and *David C. Todd* for protestants.

John H. Caldwell and *M. W. Wells, Jr.,* for interveners Growers and Shippers League of Florida, State of Florida, Department of Citrus and Florida Gift Fruits Shippers Association.

William J. Jaeger, Michael N. Khourie, Arthur Liberstein, and *A. David Millner* for interveners Arrow Carrier Corp., et al.

Roy A. Nierenberg for intervener Council on Wage and Price Stability.

REPORT AND ORDER OF THE COMMISSION

DIVISION 2, COMMISSIONERS HARDIN, MACFARLAND, AND O'NEAL

O'NEAL, *Commissioner:*

Due and timely execution of our functions under section 216(g) of the Interstate Commerce Act imperatively requires the omission of an initial decision in this proceeding. Requested findings and conclusions not specifically discussed in this report nor reflected in our findings or conclusions have been considered and found not justified or their resolution unnecessary for the proper disposition of the proceeding.

By schedules filed to become effective January 4, 1976, United Parcel Service, Inc., of New York and United Parcel Service, Inc., of Ohio, respondents herein, proposed a general increase in their local and joint rates for packages moving within or between their respective service areas. Those areas collectively embrace the 48 contiguous States, subject to certain territorial restrictions in respondents' operating authorities, as hereinafter described.

The resulting overall increase in revenue is estimated to be 5 percent.

Protests were filed by the National Small Shipments Traffic Conference, Eastern Industrial Traffic League, and Parcel Post Association. By order of the Commission's Suspension and Fourth Section Board dated December 30, 1975, the operation of the proposed schedules was suspended to and including August 3, 1976. A petition to vacate the suspension order was filed by the respondents and by order dated February 18, 1976, the petition was denied by Division 2, Acting as an Appellate Division.

By order dated January 9, 1976, the proceeding was referred to an Administrative Law Judge for hearing. Hearing was held at Washington, D.C., beginning February 25, 1976, and concluding March 3, 1976. Respondents presented their evidence by means of verified statements and oral testimony, and protestants presented verified statements and oral evidence in opposition. Growers and Shippers League of Florida, Florida State Department of Citrus, and Florida Gift Fruit Shippers Association intervened, submitted evidence, and participated fully at the hearing. Briefs were filed jointly by respondents, jointly by protestants, and jointly by the Florida interveners.

An appearance also was entered by Arrow Carrier Corp. and 19 other motor common carriers serving in the New York City garment area. They do not object as such to increased rates. Their position, greatly simplified, is that higher charges should be made by respondents for transportation in New York City and the "surrounding area" in which the intervening carriers operate. In essence, the Arrow group of carriers objects to any ruling being made herein which would foreclose them from their position in other pending proceedings. In order to protect their position, the Arrow group filed a petition on February 26, 1976, wherein they, in effect, seek a limitation of the issues, at least in the current phase of this proceeding, to the overall revenue needs of respondents. By our order dated April 21, 1976, their petition was granted to the extent that our findings and conclusions herein will be limited to issues relating to the proposed increase and will be without prejudice to such findings and conclusions as may prove to be appropriate in Nos. MC-C-8617 and MC-116200 (Sub-No. 2).

An appearance was entered at the hearing for the Council on Wage and Price Stability. However, the attorney for the Council did not participate, no witness was presented by the Council, and no position by the Council is stated.

United Parcel Service, Inc., a New York corporation, was organized June 27, 1930. It provides a specialized common carrier parcel delivery service, both interstate and intrastate, between all points in an area in the northeastern part of the United States consisting of the States of Virginia, West Virginia, and all States to the north and east, as well as the District of Columbia.

This respondent also provides service as a contract motor carrier in delivering parcels from retail stores to their customers. The latter service is confined to points in a described area of New York, New Jersey, and Connecticut within a radius of approximately 50 miles of New York City. Parcels handled in this contract carrier service are commingled with those in the common carrier service. A petition which would have the effect of converting this contract carrier service to common carriage is pending before the Commission in No. MC-116200 (Sub-No. 2).

United Parcel Service, Inc., an Ohio corporation, was organized March 19, 1934. It provides the same type of specialized common carrier parcel delivery service, interstate and intrastate, within and between all of the remaining 48 contiguous States, except that (1) its interstate certificates are restricted against its providing service (a) for packages moving from any origin to any destination both of which are wholly within an area consisting of the States of Texas, Oklahoma, and Kansas, and portions of Nebraska, Missouri, and Arkansas, (b) between Memphis, Tenn., on the one hand, and, on the other, points in Arkansas and the northern part of Mississippi, and (c) between Denver, Colo., on the one hand, and, on the other, points in Kansas and the southern part of Nebraska; and (2) it does not have intrastate authority within Utah, Idaho, Nevada, Montana, Kansas (except for the Kansas City commercial zone), Oklahoma, or Texas (except within the Dallas-Fort Worth and Houston commercial zones), or for movements wholly within Dade County in Florida.

United Parcel Service, Inc. (Ohio), provides service as a contract motor carrier for retail stores in and around various metropolitan areas, including Chicago, Milwaukee, Cleveland, Cincinnati, Detroit, Minneapolis, San Francisco, Los Angeles, and San Diego.

The features of the common carrier service provided by United

Parcel Service, Inc. (New York), and United Parcel Service, Inc. (Ohio), are identical. The two corporations maintain uniform rates, rules, regulations, and service features. They have full interline service at joint rates for packages moving between points in their respective territories. They act virtually as a single company for all operating, service, and rate purposes, and would appear to be a single company to users of the service.

United Parcel Service, Inc. (New York), and United Parcel Service, Inc. (Ohio), also provide certain ground services under contract with United Parcel Service Co., a Delaware corporation organized January 22, 1953. The latter corporation operates as an airfreight forwarder under authorization of the Civil Aeronautics Board. Its service is coordinated with the common carrier services of respondents so as to provide what is in effect a through surface-air-surface service between major parts of the 48 contiguous States, and between those States and Honolulu and the remainder of the Island of Oahu in Hawaii. The respective respondents maintain proportional rates for packages having a prior or subsequent movement by the air forwarder company. This combination surface-air-surface service is referred to as UPS's "Blue Label" service.

The historical evolution of United Parcel Service, Inc. (Ohio), and United Parcel Service, Inc. (New York), is somewhat complex. However, it appears that when United Parcel Service was engaged almost exclusively in serving retail stores in metropolitan areas as a contract carrier, a separate corporation was maintained in each principal location. As common carrier service was developed and extended, the companies in the Northeast were merged into the New York company and those in the other parts of the United States into the Ohio company. An application to merge the New York company into the Ohio company is pending before the Commission in No. MC-F-12641.

For convenience, we shall sometimes hereinafter refer to United Parcel Service, Inc., the New York corporation, and United Parcel Service, Inc., the Ohio corporation, as UPS (N.Y.) and UPS (Ohio) or as respondents. Respondents are wholly owned subsidiaries of United Parcel Service of America, Inc., a noncarrier holding company hereinafter sometimes referred to as UPSA or the holding company.

THE "PACIFIC REGION LINKUP" AND THE "48-STATE EXTENSION"

Before April 1, 1975, the operations of UPS (Ohio) on the Pacific coast were limited to the States of Washington, Oregon, and

California, various highways in Arizona, and small segments of Nevada and Idaho. UPS (Ohio) and UPS (N.Y.), collectively, also served New Mexico, Colorado, Wyoming and all States to the east.

Except for the Blue Label air service, however, UPS had no means of providing through service between its Pacific and eastern areas, and, of course, it could not provide service from, to or between the intervening States and areas except as described above.

Effective April 1, 1975, UPS (Ohio) entered into arrangements with various railroads, pursuant to tariffs filed with this Commission, which enabled it to link the Pacific region with the rest of the area UPS (Ohio) was serving to the east, using the railroads as "bridge" carriers. The territory served by UPS (N.Y.) had to be excluded from this linkup because of restrictions against interlining with other motor carriers in UPS (Ohio) west coast certificates. UPS (N.Y.), being a separate corporation, was deemed to be such an "other motor carrier."

This arrangement for the use of railroads as bridge carriers continued until July 31, 1975, at which time UPS implemented newly received authority to extend interstate service over the entire 48-State area, except as limited by the restrictions previously described.

DESCRIPTION OF THE COMMON CARRIER PARCEL DELIVERY SERVICE OF RESPONDENTS

By all accounts, the common carrier parcel delivery service of respondents is excellent and is offered at rates which, while structured along the lines of the United States Postal Service, generally are somewhat less than those for parcel post.

Certificate restrictions limit service to individual packages not exceeding 50 pounds in weight or 108 inches in length and girth combined, and to not more than 100 pounds in the aggregate from one consignor at one location to one consignee at one location on any one day. Each package is treated as a separate shipment. There are also restrictions in most of respondents' interstate certificates and some intrastate certificates against providing service between retail stores and their customers or between retail stores and their warehouses or branches.

The principal features of the involved common carrier service are described by respondents as follows:

1. Full territorial coverage for pickup and delivery. No pickup or delivery limits. Pickups and deliveries are made at any location, no matter how rural or remote from a populated area.
2. Automatic daily pickup stop, Monday through Friday.
3. Prompt, dependable delivery throughout the area served.
4. Simplified documentation; one pickup form for all shipments.
5. Pickup and delivery not limited to tailgate or to any particular distance from sidewalk; pickups and deliveries are made at any location within the premises, whether upstairs or downstairs.
6. Records permitting prompt answering of inquiries, or requests for proof of delivery.
7. Automatic coverage against loss and damage up to $100 per package; additional coverage available at low charge.
8. Three automatic attemps to deliver packages without extra charge.
9. Refused or undeliverable packages automatically returned without extra charge.
10. Simplified c.o.d. service: acceptance of checks in payment of c.o.d.'s; and uniform charge regardless of amount collected.
11. Correction of wrong addresses and notification to shipper.
12. Call-return service, to get packages back from consignee to shipper.
13. Neat, clean, and attractive appearance of drivers and vehicles.
14. Careful physical handling permitting minimum packing.
15. Cost to shippers low enough to make use of the service practical in place of parcel post.

VOLUME GROWTH OF RESPONDENTS

There has been a dramatic growth of respondents' package volume since the first major territorial extension, in 1953, of the common carrier type of parcel delivery service involved here. This is shown in table I reflecting traffic handled by respondents in common carrier service.

TABLE I

Year	*Package volume*
1952	6,908,790
1957	43,958,471
1962	117,052,206
1967	327,064,326
1972	648,488,487
1975	879,786,000

Respondents believe that the growth in the volume of packages they have attracted has come principally from four sources, that is, parcel post, privately operated delivery vehicles and deliveries previously made by salesmen and other personnel of shippers, growth of the Nation's economy, and expanded activity of businesses dealing in small parcels.

Respondents believe that further substantial growth will depend mainly upon the state of the Nation's economy, the extent of additional carrier competition, and whether parcel post subsidies may be continued or increased. They point out that with the consummation of the 48-State extension, relatively little opportunity exists for further geographical expansion.

For purposes of comparison, the following table II shows the relative growth of the common carrier traffic of respondents and the decline in the volume of packages handled by parcel post:

TABLE II

Volume handled (millions of packages)

Year	Respondents	Parcel post
1960	82	840
1961	99	800
1962	117	792
1963	148	789
1964	193	778
1965	245	742
1966	281	744
1967	327	725
1968	356	664
1969	449	644
1970	494	570
1971	547	536
1972	648	498
1973	732	475
1974	777	431
1975	880	400

It should be noted, however, that the Postal Service transports large volumes of packages in other classes of mail in addition to fourth class, which embraces parcel post, and that fourth-class magazines and books, which receive some subsidies, are not included in the foregoing parcel post count.

PROPOSED RATE CHANGES

As noted, respondents' rate structure is patterned essentially after that of the parcel post, but there are some differences. Respondents utilize a basic charge per package, plus amounts per pound which vary according to rate zones. The rate zones are determined by distance and are the same as those used by parcel post, except that respondents do not also feature a "local" zone as does parcel post.

There is a weekly service charge which entitles the shipper to have a driver stop automatically each day to ascertain whether or not the shipper has any packages to send out that day, and to pick up all such packages. This charge is $2 per week in most areas. It is $2.50 per week in a limited area in the West, and $4 per week in and around New York City. An additional charge of 85 cents applies for c.o.d. collections and address corrections, and a charge of 25 cents per $100 or fraction thereof for valuation in excess of $100. No changes are proposed for any of the above.

The specific changes proposed are as follows:

(1) The basic package charge is proposed to be increased by 5 percent or 3 cents, from 60 cents to 63 cents.

(2) The poundage rates are proposed to be increased as follows in table III.

TABLE III

Zone	Present rate per pound (in cents)	Proposed rate per pound (in cents)
2 (Up to 150 miles)	6	6.3
3 (151-300 miles)	7.5	7.9
4 (301-600 miles)	10	10.6
5 (601-1,000 miles)	12.5	13.2
6 (1,001-1,400 miles)	16	16.9
7 (1,401-1,800 miles)	20	21.1
8 (Over 1,800 miles)	24.5	25.8

Except within the "local" zone, the proposed charges of respondents would be lower in all zones than the present charges of uninsured parcel post.

The proposed increases in the zonal poundage rates vary from 5 percent for zone 2 to 6 percent for zone 4, and the total average proposed increase for all zones is about 5.5 percent. See appendix A for a more extended analysis. In computing the charge for individual shipments, fractions of 0.1 cent or greater are increased to the next whole cent.

In addition, proportional rates which, in conjunction with rates on file with the Civil Aeronautics Board, make up through charges for the surface-air-surface "Blue Label" service are proposed to be increased 3 cents per package for the origin proportional rates and 1/2 cent per pound for the destination proportional rates.

As indicated previously, no increase is proposed for certain charges and the resulting overall increase in revenues is estimated to be 5 percent.

The maintenance of uniform rates nationally, both interstate and intrastate, along the lines of the parcel post rate structure, is an important objective of respondents. They consider the simplicity of their rate structure to be an essential feature of their service.

Respondents have been successful in achieving their objective of maintaining uniform rates nationally except intrastate in a few Western States where intrastate and interstate rate changes are not made simultaneously. Also, most States allowed the rates proposed here to go into effect for intrastate movements. Despite their desire to maintain uniform rates, respondents felt that they could not forego the revenue the intrastate increases would produce while the interstate rates were under suspension. According to respondents, the use of two separate rate charts is causing considerable customer dissatisfaction.

CORPORATE ORGANIZATION

Respondents, UPS (N.Y.) and UPS (Ohio), as noted, are wholly owned subsidiaries of United Parcel Service of America, Inc., a Delaware corporation. They contribute 95 percent of the revenue of the holding company. UPSA has the following additionally wholly owned operating subsidiaries:

United Parcel Service, Inc. (Florida), which provides service intrastate in Florida under contract with Jordan Marsh, a Miami department store, for delivery of packages and furniture to the store's customers and for the transfer of merchandise between the store's warehouse and its main and branch stores.

United Parcel Service of Pennsylvania, Inc., which provides service intrastate in a portion of western Pennsylvania under contract with Joseph Horne, a Pittsburgh department store, for delivery of furniture to its customers and transfer of merchandise between its warehouses and its main and branch stores.

United Parcel Service, Inc. (Virginia), which provides intrastate service in Virginia, using personnel and facilities of UPS (N.Y.). This separate corporation results from a provision of Virginia law which requires a domestic corporation for intrastate carriage.

UPS, Ltd., a Canadian corporation which has a small local parcel delivery service in Toronto.

United Parcel Service General Services Co., which, under contract with UPSA, provides various specialized and technical services to the operating companies.

United Parcel Service Co., an airfreight forwarder operating under the jurisdiction of the Civil Aeronautics Board.

Red Arrow Bonded Messenger Corporation, which provides an intrastate special messenger and delivery service in southern California.

OWNERSHIP OF HOLDING COMPANY, UNITED PARCEL SERVICE OF AMERICA, INC.

UPSA can be described as an employee-owned company in the sense that a large portion of its shares is owned directly or beneficially by present employees, retired employees, the families of present or retired employees, or the estates or heirs of decreased former employees. The stock is not publicly traded.

In any event, UPSA has approximately 9,000 shareowners. Of these, more than 6,600 are active supervisors and managers at all supervisory and management levels, including first-line supervisors. The remainder are, with minor exceptions, other present employees, retired employees, the families of present and retired employees, the estates or heirs of decreased former employees, or charitable trusts established by present or former employees. No individual owns as much as 5 percent of the outstanding shares.

A number of the buildings and properties used by respondents in their operations are leased from subsidiaries of Service Plants Corporation, a related company, the stock of which is held in trust by unspecified persons for the benefit of the shareowners of UPSA. Financial statements used in this proceeding by respondents relating to UPSA reflect the combined figures of UPSA and Service Plants Corporation.

UPSA has entered into an agreement with each of its wholly owned operating subsidiaries to provide a wide variety of specialized technical, advisory, and management services. The agreement provides for a fee of 4.5 percent of the revenue. There is provision for indemnification by UPSA to the operating subsidiary in the event the subsidiary sustains a net loss in any year. However, for the purpose of determining the operating costs of respondents, only the actual cost to UPSA of providing those services is included in respondents' listing of expenses.

PROJECTION OF COSTS AND REVENUES

In support of the proposed increased rates, respondents provide a study projecting the common carrier operating results they expect to achieve for a 12-month study period commencing April 1, 1976, and ending March 31, 1977, if the proposed rates were to become effective at the start of that period. The study projects revenues of

$1,710 million, expenses of $1,583 million, and net operating revenues of $127 million, producing an operating ratio of 92.6. Without the proposed increase, respondents' study year operating ratio is projected as 97.2.

The projections are developed by using the year 1975, for which respondents common carrier operating ratio was 90.1, as the base year. Common carrier operating expenses of $1,375 million and revenues of $1,527 million for first annualized for that base year to reflect what they would have been (1) had wage and fringe benefit costs per hour in effect December 31, 1975, been in effect for the entire year, (2) had rate increases in effect on December 31, 1975, been in effect for the entire year, and (3) had the additional volume of packages generated by, and the additional operating revenue and costs resulting from, the "Pacific Region Linkup" which commenced April 1, 1975, and the "48-State Extension" which commenced July 31 1975, been experienced for the entire base year.

Starting with the annualized figures for the 1975 base year, which are: operating revenues $1,628 million; expenses $1,471 million; net operating revenues $158 million; and operating ratio 90.3, expenses for the projected 12-month study period are further adjusted to reflect increases in wage and fringe benefit costs per hour which take effect during the 3-month period preceding the study year as well as those which take effect during the study year, all pursuant to actual preexisting labor contracts. Driver rates, which generally are higher than those of other employees, are used in this adjustment. Where labor contracts are scheduled to expire during the 12-month period, but increases are not yet negotiated, a minimum increase of 8 percent is added to the current cost per hour. This is supported by a written promise by respondents to labor unions which represent 80 percent of their approximately 80,000 employees.

A large number of respondents' 40 separate labor agreements come up for renewal at various times throughout the 12-month period used for the projection. Increases provided in current contracts to become effective during that period, or those covered by the 8-percent firm offer, are included in the projection only for the portion of the 12-month period they will be in effect. The same percentage increases are applied to nonunion labor, even though nonunion labor costs are said to increase at a higher percentage rate than that provided for in union contracts.

The estimate of nonpayroll costs for the projected 12-month period was determined by increasing base year unadjusted nonpayroll costs at an annual rate of 6.81 percent, a rate that is respondents' actual average annual increase in nonpayroll costs per package for the 4 years, 1972 through 1975. This rate compares favorably with 6.97 percent for the corresponding average annual increase in the U.S. Gross National Products Deflator and 9.65 percent in the U.S. Wholesale Price Index. See appendix B for a more detailed discussion of the revenue and cost adjustments of respondents and protestants and the Florida interveners.

Respondents also project returns on total investment and on shareholders' equity. These are based on consolidated figures for the entire United Parcel Service organization, for which respondents produce approximately 95 percent of the total revenue. For operations producing the remaining 5 percent of the organization's total revenue, the projection assumes the after-tax earnings for the projected 12-month period would be the same as for the year 1975.

The return shown on shareowners' equity is 15.1 percent and on total investment 14.7 percent. Both of these assume that the proposed rate increase had been allowed to go into effect April 1, 1976, and that respondents' earnings would be as they project for their study year.

The projected return on shareowners' equity for the 12-month period starting April 1, 1976, if no increase is allowed, is 7.1 percent and on total investment 7.0 percent. Additional evidence concerning these figures is set forth in appendix C.

Data Relating to the Operating Ratio and Return on Shareholders Equity which Respondents Believe should be Allowed

Respondents contend that their projected earnings level is well within the bounds of maximum reasonableness. They believe that they are entitled to an opportunity to achieve earnings levels comparable to those achieved by certain other large motor carriers, if they are to continue to maintain an efficient operation and a high quality of service. They show that certain other large motor common carriers achieve operating ratios below 90 and returns on equity of 17 percent or better.

In support of their position concerning revenue needs and an adequate earnings level, respondents amplify facts which they consider to be the risks of their business. These are said to include risks resulting from the high labor content of the work and the high degree of unionization, greater vulnerability to labor stoppages because respondents contract individually with the labor unions representing their employees and not as members of the group that is bound by the National Master Freight Agreement; the fact that as a matter of policy and because of their size respondents do not protest competitive applications and do not have franchise protection, and the fact that their sole business is parcel delivery and that they do not have the minimization of risk that diversification normally provides.

A risk to which respondents claim to be uniquely vulnerable is that their principal competitor, parcel post, could become subsidized at any time to such an extent as to make it impossible for respondents to offer competitive rates. This is said to be a real and continuing possibility because of the pressures of continuing losses by the U.S. Postal Service. Respondents assert that to compete at equal rates with parcel post, their own operating costs must be sufficiently lower than those of parcel post to offset an alleged parcel post subsidy of approximately 9 percent, cover Federal and State taxes, and produce a reasonable profit.

An economist testifying in behalf of respondents presented information as to weighted average rates of return for the 7-year period 1968-1974, for approximately 125 nonregulated companies whose stock is publicly traded, each of which had annual sales in excess of $50 million, and whose returns on shareholders' equity ranged from 16 percent up to more than 31 percent. Some of these companies are members of organizations opposing the proposed increase.

RESPONDENTS' INCENTIVE PLANS

There are incentive plans for respondents' supervisors and hourly employees. Respondents believe that one of the major reasons for their present efficiency, high quality of service and dependability is the incentive all supervisors and managers have to protect and improve the company's earnings level.

Approximately 6,600 supervisors or managers participate in an incentive plan. In this they have an opportunity to earn compensation in addition to their base salaries, in relation to UPSA's earnings. This compensation is in the form of shares of stock in UPSA, thus enabling stockholder-managers to build up substantial ownership interests. In effect, they receive 15 percent of UPSA's earnings before taxes in the form of stock. This is treated as an expense item by UPSA in that the stock is purchased by UPSA from retired employees and is redistributed to current employees.

Including the bonus, the total amount of compensation paid to respondents' employees is not considered excessive even by protestants.

In addition, the great proportion of respondents' hourly and supervisory employees participate in a thrift plan, by which earnings on their balances are determined in relation to UPSA's earnings. The employees can contribute up to $6 a week to this plan.

Respondents believe that users of their service would suffer if earnings are so restricted that the rewards for the extra efforts of its managers, supervisors, and hourly employees are nullified.

As of late November 1975, the estimated 1976 capital expenditure for the entire family of United Parcel companies was $113 million. All this was to be used for operating facilities. In this regard, respondents report that some of this will be devoted to facilities needed for the extended operations. A portion of the needed facilities were added during 1975 but all will not be in place until 1977. During 1975, capital expenditure for the entire United Parcel family of companies was $144,358,000.

Respondents make annual payments out of their earnings to their parent UPSA. In turn, UPSA makes funds available to respondents or to other of its family companies. As to dividends, the policy of UPSA is to pay a dividend equivalent to approximately 2 percent per annum of the current price of UPSA's stock.

PROTESTANTS' EVIDENCE

The evidence of protestants relates primarily to revenue and cost data submitted by respondents and is dealt with in detail in the appendixes. The protestants believe that no increase in the package and poundage charges of respondents is warranted at this time. Protestants believe respondents have not properly annualized their 1975 operating results, are using improperly some labor increases that will not occur until January 1977 and estimated nonpayroll expenses that will not occur until March 1977, have failed properly to project demonstrable increases in volume in 1976, have given no effect to increases in productivity, and have improperly included intrastate traffic together with interstate traffic in their cost presentation.

Protestants use actual volumes for the months of August 1975 through January 1976 and by use of a regression analysis arrive at a daily average package volume of 424,899, in contrast to the 318,378 employed by respondents for the purpose of adjusting traffic volume for the calendar year 1975 base year. Protestants' adjustment results in an annualized 1975 base year operating ratio of 89.7. Protestants also take the position that July 1, 1975, is the proper date to be used for the purpose of determining the increased labor costs of respondents. Limiting labor cost increases to those which will occur between December 1, 1975, and July 1, 1976, results in a labor expense increase of $68.6 million as opposed to the labor increase of $74 million projected by respondents.

With respect to nonlabor costs, protestants maintain that the protestants' increase factor of 6.8 percent per year should be applied only for the period of December 31, 1975, to July 1, 1976, resulting in an increase of 3.41 percent as of that date as opposed to the cumulative 8.53 percent used by respondents. The result of that adjustment is to reduce the projected nonlabor costs from $38 million to $15 million.

Based upon the above labor and nonlabor adjustments, protestants maintain that without the rate increase for which respondents have filed, there would be a resulting operating ratio of 94.7. Such adjustments, however, do not include the impact of increases in volume which protestants maintain will be enjoyed by respondents. Protestants note that from the year 1974 through 1975 respondents have experienced an average increase in volume of 13 percent. For the 5-year period, 1969 through 1974, the average increase in volume was 11.6 percent. Protestants adjust respondents' package volume upon the basis of the volume for January 1976 compared to January 1975, less the volume growth which resulted from respondents' territorial extensions in 1975. This results in a "nonextension volume" gain in volume of 7.9 percent.

The increased costs to respondents resulting from this volume are calculated upon the basis of an operating ratio of 63.2 percent which is computed from figures used by respondents with respect to additional traffic resulting from the Pacific region linkup and the 48-State extension. The net result of this adjustment by protestants is that without a rate increase, respondents' operating ratio as of July 1, 1976, would be 92.4 percent. Further, if effect is given to the $16 million of revenue from intrastate rate increases which became effective in 1976 prior to the hearing, the operating ratio would be 91.6 percent. If the rates which have been filed by respondents were to go into effect on July 1, 1976, the operating ratio as computed by protestants would decrease to 88.0 percent.

Additionally, protestants maintain that respondents failed to take into account productivity gains through increased efficiency. Respondents experienced significant productivity gains in the period of 1970 to 1974 and protestants believe that this trend will continue.

Protestants maintain that respondents' inclusion of both interstate and intrastate traffic in the respondents' financial exhibits is improper and distorts the operating ratio on "issue" traffic. It is the position of protestants that this Commission can only consider the revenues and costs involved in respondents' interstate traffic, since it is that traffic and that traffic alone over which the Commission has jurisdiction. Protestants have calculated what they believe to be the operating ratios for respondents' interstate and intrastate traffic, respectively. The result of this is to show that the operating ratio on interstate traffic is 80.8, without any rate increase.

Protestants also take the position that an operating ratio of 95 would be appropriate for respondents. This is based upon the development of the average operating ratio for all general freight carriers engaged in intercity common carriage with revenues of over $1 million per annum. Those figures show that the average operating ratio for the most recent 5-year period of 1970 through 1974 was 94.6, or very close to the 95 operating ratio which protestants state has been used as a standard by the Commission during the last 5 years. Further, protestants state that respondents' return on stockholder equity has risen to a high of 37 percent in 1975, compared to returns of no more than 15 or 16 percent for the general freight carriers during the last few years.

Protestants also take issue with the showing by respondents of shareholders' equity and return for United Parcel Service of America, Inc. (UPSA), and Service Plants Corporation combined. It is the position of protestants that only the amount shown on the combined balance sheet of respondents, not UPSA, should be used for the purpose of computing a return on shareholders' equity. Also, to arrive at their figures, respondents added to UPSA shareholders' equity a deferred Federal income tax credit of $36,019,000 and deferred investment tax credit of $15,832,000. Protestants indicate that these are sums of money which are owed to the Government and do not belong to the shareholders and should not, therefore, be considered equity. In addition, such amounts are used by respondents on an interest-free basis. Protestants maintain that a proper calculation of the return on UPSA stockholders' equity for the year 1975 would be 23.33 percent.

Additionally, protestants challenge the propriety of including all of the short-term investments shown by UPSA as a part of its equity. As of December 31, 1974, that amount was $49,678,000 but as of December 31, 1975, it had grown to $93,481,000. It is protestants' position that this is an excessive amount of cash which should have been distributed to the shareholders of UPSA which would have resulted in a decrease in the amount of the shareholders' equity Since this is an exceptional amount of cash and is not yet devoted to transportation use, protestants believe it should not be considered by the Commission in determining the return on shareholders' equity.

Protestants also challenge the methods used by UPSA in paying out its stock to employees. Because of the manner in which this is done, protestants believe that respondents artifically inflate the expenses and deflate the net operating income of UPSA. For example, in 1975, expenses would have been $30 million less and the operating income $30 million more. In short, protestants maintain that the value of the stock distributed to the supervisory employees of respondents should be treated as a profit rather than an expense item. Protestants believe that respondents' stock incentive plan is not an employee plan since it benefits employees who are also stockholders of the company.

Protestants also note that UPSA's profits for the period of 1970 through 1975 amounted to approximately $340 million. Protestants compute that between 1970 and 1975, UPSA paid out approximately $58 million in dividends to its stockholders. The funds not declared as dividends were either reinvested in carrier facilities or held by the company as current assets, as UPSA has retired most of its debts.

The per-share value of UPSA stock increased from an average of $6.78 in 1970 to $19.25 on March 1, 1976.

Protestants also trace the rate of growth which respondents have enjoyed from the period of 1955 through 1975. Protestants show that respondents had an increased volume of 242.2 percent during the period of 1955 through 1960 as compared with 25.9 percent for other regulated motor carriers. Even though the rate of growth has slackened, during the period between 1971 and 1975 respondents enjoyed a growth rate of 60.8 percent as opposed to a growth rate of 38.1 percent for other regulated carriers. Protestants believe that this declining rate of growth indicates a declining need for new capital. Protestants also point out that the average rate of return for the motor carrier industry with respect to equity devoted to transportation for the 5-year period of 1968 through 1972 was 13.9 percent.

The only evidence other than that presented by respondents and protestants was a statement on behalf of Growers and Shippers League in Florida; State of Florida, Department of Citrus; and Florida Gift Fruit Shippers Association. All of these interveners are involved in the gift fruit industry of the State of Florida and as such are interested in the cost of shipping gift fruit packages from the State of Florida to various points throughout the United States. Approximately two million gift fruit packages are shipped annually from Florida during the season which runs from October to May. Most of the gift fruit shipments are transported by line-haul transportation arranged by interveners for deposit in parcel post, respondents' parcel service, or other cartage companies. For the period beginning in the 1970 - 71 season and extending through the 1974-75 season, the percentage of total parcels shipped via respondents' service has increased from 22.8 percent to 57.0 percent. The average weight per package of Florida gift fruit is 31.85 pounds and over 83 percent of the packages weigh in excess of 20 pounds with the 26-pound package accounting for almost 42 percent of the total number of packages. The Florida interveners are opposed to the proposed rate increase. They take the position that heavyweight parcels already are being overcharged in the respondents' rate schedule since, in the opinion of interveners, the costs of handling a parcel are substantially incurred on a piece basis and costs do not increase in proportion to increase in weight. It is interveners' position that in the absence of any actual data to support the difference in rates for heavyweight parcels, respondents have failed to support even higher rates. More detailed statements concerning the position of the Florida interveners are contained in appendixes A and B.

Discussion and Conclusions

The last increase in the interstate rates of respondents occurred more than 18 months ago in January 1975. Since that time, traffic and revenues increased tremendously and, despite rising costs, respondents have maintained what must be described as a sound financial condition. During 1976, barring lengthy labor difficulties, there is no evidence indicating that the traffic and revenues of respondents will not continue to increase and no evidence indicating that, even without a rate increase, respondents will not maintain a relatively sound financial position.

Respondents have, however, experienced significantly escalated costs since January 1975. Protestants admit that these cost increases have been and are being incurred, but they believe that the extent of the increases has been overstated. In particular, they feel that respondents have not properly annualized their 1975 operating results; have included in the cost updating some labor expenses that will not occur until January 1977; have projected nonlabor expense increases as far in the future as March 1977; have failed to project properly the increases in volume of business in 1976; haved failed to adjust the costs for increased productivity; and have failed to separate interstate and intrastate traffic in the cost presentation.

Protestants' objections to respondents' cost presentation have some merit. For example, the protestants correctly note that respondents have failed accurately to annualize 1975 operating results. Their own attempts at annualization, however, being based in part on respondents' figures, are also improper, and the basis for our annualization follows. Unless otherwise indicated, our cost analysis relates only to the operations of UPS (Ohio) and UPS (N.Y.), as this is the manner in which the respondents' cost analysis was presented.

Respondents' update of the 1975 actual year results to yearend 1975 revenue and cost levels is correct for the revenue and the labor-related expenses, but is overstated for nonlabor expenses. Respondents update the 1975 labor expenses to yearend levels and then, after subtracting management expense, identify the nonlabor expense by applying a factor of 31.15 percent to the total expenses at yearend wage levels. The 31.15-percent factor represents the percentage of nonlabor to total expense for actual 1975. By applying that factor to the 1975 expenses updated to yearend wage levels, respondents have in effect restated the 1975 nonlabor expenses to yearend levels by imputing the labor cost increase factor to nonlabor costs. In other words, the application of the factor to 1975 expenses corrected for wage levels increased during the year will result in an overstatement of the nonlabor expenses by an amount equal to the unrelated percentage increase in labor costs less the percentage increase in nonlabor expenses. For example, if labor costs at the yearend 1975 level were 10 percent greater than for 1975 actual and if nonlabor costs were 30 percent of 1975 actual expenses and also of 1975 total expenses at yearend cost levels, then under this method nonlabor costs at yearend level would be 10 percent greater than for 1975 actual.

We applied the 31.15-percent factor to the 1975 actual total expenses and updated those nonlabor expenses to yearend 1975 levels by increasing them 3.35 percent. The 3.35 percent was developed by taking the square root of 1.0682, which represents respondents' calculated annual increased nonlabor expenses.[1] We accept respondents' increase factors as reasonable, as did protestants.

Thus, at yearend 1975 levels respondents' 1975 restated system operations show the following:

Item	*Amount*
Operating revenue	$1,628,238,376
Operating expenses	1,467,055,330
Net operating revenue	161,183,046
Operating ratio--(percent)	90.1

Respondents' updating of revenues beyond the yearend 1975 level is essentially accurate, but their updating of expenses contains certain deficiencies, one of which is major. In particular, the major problem with respondents' update is that it attempts, from a cost standpoint, to justify a rate increase on the basis of anticipated wage and price increases. This method of ratemaking is improper as the imposition of increased rates and charges to offset future cost increases generally leads to excessive and unjustifiable profits. In the case of a carrier such as UPS (Ohio), with its exceptionally high rates of return, this would be particularly true.

In the instant proceeding, respondents account for wage increases that will be incurred as far into the future as January 1977. This is clearly improper. The bulk of the 1976 wage increases, however, became effective in May, and we will permit the use of these increases in computing updated expenses.

Respondents show increased labor expenses over the yearend 1975 level of $74 million, while protestants show $68.6 million. The difference reflects the wage increases which will become effective after the beginning of July 1976. In view of our finding as to future cost increases, we accept protestants' figures.

Respondents and protestants also improperly update nonlabor expenses beyond the yearend 1975 level. This is partly because respondents attempt to project these expenses into 1977. To update these expenses to the July 1, 1976, level, we increased the yearend 1975 expenses by the factor 1.0335. In other words, we have increased the 1975 actual nonlabor expenses to the July 1, 1976, level by a factor of 1.0682 (1.0335 x 1.0335).

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[1] See appendix D.

Protestants contend that respondents failed to adjust the projected operating results to account for expected increases in volume. Protestants attempt to adjust for the increased volume, based on their calculation of the increased volume and of the operating ratio achieved on the 1975 additional traffic that resulted from the Pacific region linkup and the 48-State extension.

Protesants develop a 7.9-percent increase in volume projected for 1976 with the inclusion of the volume growth that resulted from respondents' territorial expansion. That 7.9-percent factor is based on a comparison of packages handled, January 1976 versus January 1975. The use of a comparison of the same month for 2 years, however, is insufficient to determine volume growth for 1 year over another.

Protestants' calculation of the 63.2-percent operating ratio for the added traffic that resulted from the Pacific region linkup and the 48-State extension appears statistically correct. However, the application of this operating ratio to respondents' present operations is illogical, because protestants assume that the cost of handling all packages is constant. This is not necessarily true. Such costs would vary by weight and by distance moved. No data are offered to show the average weight or length of haul per package for the additional traffic compared to other traffic.

Protestants' use of the 63.2-percent operating ratio assumes that any increases in volume resulting from the extension traffic will automatically show only $63.20 of expenses for every $100 of revenue. There is certainly neither a guarantee nor a reason to believe that any additional extension traffic will produce $36.80 of profit for every $100 of revenue. It could just as well be the case that the increase in traffic volume could produce a change in the UPS operations that would lead to reduced efficiency and higher unit costs. Of course, the converse could also be true. In our judgment, protestants have not shown sufficient proof that their assumptions are valid, and we would hesitate to project increased revenues and expenses resulting from projected increases in volume handled. Therefore, we have disregarded the projection of increased volume in 1976 in our restatement of the 1975 system operating results.

Protestants argue that respondents should have made an adjustment to their updated 1975 revenues and expenses to allow for increased productivity, but offer no suggestions as to the method of reflecting productivity gains. Respondents offered an 11-year study of packages per man-hour which showed for 1965 that 7.8 packages per man-hour were handled, while in 1975 only 7.7 packages per man-hour were handled. The trend from 1965 to 1970 was for a decrease in packages per man-hour, while for 1970 to 1975 the trend was for an increase, ending in 1975 almost at the original 1965 level.

The evidence of productivity gains being achieved in the future is inconclusive. Therefore, we find no justification for any adjustment of figures to allow for productivity.

Protestants object to respondents' failure to separate revenues and expenses between interstate and intrastate traffic. Protestants, using statistics for the second quarter of 1975 extracted from UPS workpapers, attributed 24.80 percent of system 1975 revenues and 32.53 percent of system 1975 expenses to intrastate traffic. The resultant operating ratios were 118.1 percent for intrastate traffic and 80.8 percent for interstate traffic.

Respondents claim that protestants' percentage of intrastate traffic is too high because the use of statistics from the second quarter of 1975 excludes the added interstate traffic volume from the Pacific region linkup and the 48-State extension. We agree. We add that the use of data for one quarter to split annual revenues and expenses between interstate and intrastate operations is not reliable.

However, we agree with protestants that respondents should have shown separate operating revenues and expenses for interstate and intrastate operations. The intrastate revenues are apparently approximately 20 percent of system revenues, since the subject rate increase proposal will produce increased annual intrastate revenues of $16 million and total increased annual revenues of $81.4 million. If approximately 20 percent of the system operation is nonaffected traffic, it is appropriate to separate the operational data between affected and nonaffected traffic.

Taking into account all of the previously described adjustments, we compute the following annualized system revenue and expense figures at the stated levels as follows:

Item	1975 Actual revenues and expenses	Revenues and expenses at December 31, 1975 level	Revenues at December 31, 1975 level expenses at July 1, 1976 level	Revenues and expenses at July 1, 1976 level[1]
Operating revenue	$1,526,833,342	$1,628,238,376	$1,628,238,376	$1,709,650,195
Operating expenses	1,374,956,660	1,467,055,330	1,550,485,157	1,550,485,157
Net operating revenue	151,876,682	161,183,046	77,753,219	159,165,038
Operating ratio—(percent)	90.1	90.1	95.2	90.7

[1] Revenues include proposed increase.

No allowances for a projected increase in volume in 1976 nor for any change in productivity were made. The above figures reflect 1975 UPS (Ohio and N.Y.) system operations updated to and annualized at the designated revenue and expense levels.

Other financial data

Despite the cost increases incurred in the past 18 months, respondents have continued to maintain a high level of profits overall. The 1975 rates of return on average stockholders' equity and investment for UPS (Ohio); UPS (N.Y.); and UPSA and Service Plants Corp. combined are as follows:

	Net income (loss)	Average equity	Rate of return
			Percent
UPS (Ohio)	$63,494,296	$144,373,003	44.0
UPS (N.Y.)	(76,450)	26,862,220	--------------
UPSA and Service Plants Corp. combined	90,745,000	388,912,000	23.3

	Net carrier operating income	Average investment[1]	Rate of return
			Percent
UPS (Ohio)	$145,777,303	$169,645,529	85.9
UPS (N.Y.)	11,020,534	92,239,869	11.9
UPSA and Service Plants Corp. combined	165,826,000	460,461,000	36.0

[1] Includes net working capital.

Our recent Bureau of Accounts report covering the first quarter of 1976 and the 12 months ending March 31, 1976, shows that, for the year ending March 31, 1976, the returns on equity for UPS (Ohio) and UPS (N.Y.) were 43.34 percent and 0.15 percent, respectively. These rates of return were calculated by dividing each carrier's net income for the 12 months ending March 31, 1976, by its stockholders' equity as of December 31, 1975. In 1975, UPS (Ohio) and UPS (N.Y.) combined generated a 37-percent return on stockholders' equity.

Although the combined statistics of UPSA and Service Plants Corp. include results of some affiliates whose primary business is unrelated to the carriers, we believe they are relevant to the issues involved in this proceeding. The two carriers, UPS (Ohio) and UPS (N.Y.), account for approximately 95 percent of the income of UPSA. Both carriers also lease real estate from subsidiaries of Service Plants Corp. and the stock of Service Plants Corp. is held in trust for the benefit of UPSA stockholders. In 1975, UPS (Ohio) leased property from 55 of Service Plants Corp.'s 84 wholly owned subsidiaries. UPS (N.Y.) leased property from 32 of Service Plants Corp.'s 84 subsidiaries in 1975. Almost all of Service Plants Corp.'s leasing subsidiaries derived at least half of their revenue from the carriers. Thus, the impact of any unrelated operations is insignificant.

For 1975 the combined actual return on stockholders' equity for UPS (America) and Service Plants Corp. was 23.33 percent. This figure was derived by dividing net income by average stockholders' equity. The combined return on investment was 36 percent. This figure was developed by dividing net carrier operating income by average transportation investment.

As we stated, the revenue projections of the two carriers are essentially accurate, but the expenses have been overstated. Our restated expense projections are lower than the operating expenses of $1,582,727,453, projected by respondents, by approximately $32 million. Substituting our restated expense projections for UPS (Ohio) and UPS (N.Y.), the projected revenues and expenses for UPSA and Service Plants Corp. combined would be approximately as follows:

Without the increase:	
Revenues	$1,716,341,000
Expenses	$1,624,638,000
Operating ratio----------(percent)	94.6
Return on investment---------(percent)	16.5
Return on adjusted projected yearend equity----(percent)	11.7

With the increase:	
Revenues	$1,797,753,000
Expenses	$1,624,638,000
Operating ratio (percent)	90.4
Return on investment (percent)	28.5
Return on adjusted projected yearend equity (percent)	19.6

Ultimate conclusions

Based on these figures and the current financial position of respondents, it does not appear that the 5-percent increase has been justified from the standpoint of revenue need. With the increase, the combined operations will yield a return on investment of approximately 29 percent and a return on projected yearend equity of approximately 20 percent.[2] While we agree that respondents conduct very efficient operations, these returns are extremely high. Although the bulk of the cost increases were not incurred until after March 1976, the first quarter operating results of respondents are exceptionally good. Also, while the combined results for UPSA and Service Plants Corp. for the first quarter of 1976 are not available, the combined first quarter 1976 revenues of UPS (Ohio) and UPS (N.Y.) amounted to $469,783,000, a 35.6 percent increase over the 1975 first quarter combined revenues. Combined first quarter 1976 net income for UPS (Ohio) and UPS (N.Y.) amounted to $16,512,000, a 64.2-percent increase over the combined first quarter 1975 income of $10,056,000. Inasmuch as UPSA and Service Plants Corp. derive almost all of their revenues from UPS (Ohio) and UPS (N.Y.), it can be expected that the systemwide results for the first quarter of 1976 would improve substantially also.

We agree that respondents seem to provide excellent service on shipments for which adequate service at reasonable rates is woefully lacking. While parcel post and other regulated motor carriers do provide the public with small shipment service, their operations are so diversified that they cannot in most cases provide the service at rates which are competitive with those of the UPS carriers. Absent the existence of competitive forces, regulatory restraints become even more essential.

Protestants have stated that returns of 15 or 16 percent on stockholders' equity are normal for general carriers of freight during the past few years. They also state that, without the increase, the respondents' operating ratio would be 92.4. Respondents, on the other hand, compute a 92.6-percent operating ratio and a 15.1-

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[2] The projected yearend equity has been adjusted to exclude deferred income taxes and deferred investment tax credits from stockholders equity.

percent return on shareowners' equity, if the increase is approved. Because of the inadequacies in the cost presentations previously described, each of these computations is inaccurate.

Based on our restated costs, however, the approval of a 3-percent increase would produce the following approximate combined results for UPSA and Service Plants Corp.:

Revenues	$1,765,188,000
Expenses	1,624,638,000
Net operating income	140,550,000
Operating ratio (percent)	92
Return on investment (percent)	23.9
Return on adjusted projected yearend equity (percent)	16.5

On the basis of these figures, a 3-percent increase appears warranted in this proceeding. The resulting projected operating ratio of 92 percent is comparable to the ratios of other profitable carriers. It is essentially the same as that computed by respondents on the basis of a 5-percent increase, and by protestants on the basis of no increase. The 16.5-percent return on equity is not out of line with the returns enjoyed by other carriers. It, too, is comparable to the return computed by respondents on the basis of a 5-percent increase.

Under the circumstances here present, then, we feel that an increase of 3-percent in respondents' package and poundage rates is just and reasonable. An increase of this magnitude will permit respondents to maintain their excellent service and profitable operations, and will insure that the rates for small shipments service remain at a just and reasonable level.

The Florida interveners.

The Florida interveners have the same rights as the Arrow group, with respect to the filing of a formal complaint. However, as to the former, it should be noted that the only changes proposed herein relate to percentage increases in the package and poundage rates of respondents. From the point of view of the Florida interveners, this aggravates the burden on heavier packages, but we cannot agree with interveners' major premise that their packages, which average 31.85 pounds, are not much more costly to transport than packages weighing 12 pounds, the system average of respondents. Beyond this, respondents would be required to make possibly major modifications of their facilities if a much heavier mix of packages were introduced. Absent a greater indication of injury to the Florida interveners, we do not believe adoption of their position is warranted in this proceeding.

The weekly service charge of respondents also is attacked by the Florida interveners as being insufficient to cover the cost of pickup services. However, that charge, which is not proposed to be changed herein, is not exactly a pickup assessment as alleged. Rather, it is a charge for designation of a shipper's facilities as a place of call for one of the daily peddle schedules of respondents. The mere fact that the Florida interveners find it more convenient to deliver freight directly to the terminals of respondents does not provide a sufficient basis for modification of the weekly service charge.

FINDINGS AND ORDER

Upon consideration of the entire record, we find that the schedules suspended by order of the Board of Suspension, dated December 30, 1975, are not shown to be just and reasonable, to the extent that they embody increases greater than 3-percent.

We further find, that this decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

IT IS ORDERED, That the respondents herein be, and they are hereby, notified and required to cancel forthwith the schedules described in the order of the Commission's Suspension and Fourth Section Board entered in this proceeding on December 30, 1975, upon not less than 1 day's notice to this Commission and to the general public by filing and posting in the manner prescribed by the Commission under section 217 of the Interstate Commerce Act, without prejudice to the establishment of rates and charges, on not less than 1 day's notice, reflecting a 3-percent increase in the present package and poundage rates as explained in the body of this decision, and that this proceeding be, and it is hereby, discontinued.

APPENDIX A

The differences in the percentage of increase proposed for the poundage rates for the various zones are relatively minor, but can have some substantial cumulative effect. For example, in zone 4, the difference between a 5-percent increase and a 6-

percent increase in the poundage or per-pound rate is 0.1 cent. In the case of a 10-pound shipment, the difference would amount to 1 cent and in the case of a 50-pound shipment, 5 cents. Stated somewhat differently, using a zone 4, 50-pound shipment as an example, the present involved charge (basic package charge plus poundage rate) is $5.60. With a 5-percent increase in the basic package charge and a 6-percent increase in the poundage rate as proposed, the total proposed basic charge is $5.93, whereas with only a 5-percent increase in both the basic package charge and the poundage rate, the total proposed basic charge on the 50-pound shipment would be 5 cents less or $5.88. Finally, in this regard, it is important to stress that although the percentage increases proposed for the various zonal poundage rates vary between 5 and 6, there are no variances within any individual zone. For example, table I below, which combines the basic package and poundage charges, shows that after making allowance for the rounding off of fractions to the next highest cent, a uniform 5-percent increase is proposed for zone 2.

TABLE I

Weight	Current rate	Proposed rate	Increase at 5 percent
Pounds	*Cents*	*Cents*	*Cents*
2	72	76	3.6
5	90	95	4.5
10	120	126	6.0
13	138	145	6.9
18	168	177	8.4
20	180	189	9.0
26	216	227	10.8
35	270	284	13.5
48	348	366	17.4

Similar uniformity, although in excess of 5 percent, is evident in the case of each of the other zones.

Respondents furnished no cost data from which a determination can be made of the cost-revenue relationship for any weight bracket. The Florida interveners point out that under the essentially uniform percentage increases proposed by respondents, greater absolute increases are to be borne by the heaviest packages moving the furthest distance. They complain that respondents' rates already are structured to attract a balance of packages averaging about 12 pounds and that respondents do not wish to attract a greater percentage of heavier packages in the 30- to 50-pound range.

In explanation of this, respondents state at pages 124 and 125 of the transcript as follows:

> We have not made a specific study. We have concluded on the judgment of our practical operators and our engineering people that the heavier packages tend to slow up the entire operation. That people tend to pace themselves according to the sort of the average weight or the heavier packages you get. So it is not just the cost of handling the 50-pound package in and of itself that we have to think about. We have to

think about if a man is handling a lot of 40- or 50-pound packages, it is going to slow up the handling of the 5- and 10-pound packages. So that we believe that our present rate structure has attracted the balance of packages among the weight breaks for which our operation is geared and which enables us to operate at the kind of costs we are producing. We used to say for example, when Railway Express was in cases, Railway Express used to say that they handled everything from peanuts to elephants. We used to say yes and that is the trouble. That they handle the peanuts like they do the elephant. The principle is there. If you get a lot of 50-pound packages, they are going to handle the 1- and 5-pound ones like they do the 50-pound ones. So that our rate structure has attracted a balance of packages averaging about 12 pounds as I have said and that this enables us to produce the kind of costs that we think the public wants and for that reason any tampering with our rate structure which would tend to attract more heavy packages, we think would be detrimental to the whole operation.

APPENDIX B

The base year nonpayroll costs are the actual expenses for the year ending December 31, 1975. In the case of the 1975 payroll costs, respondents adjust these as if the higher year end costs had been in effect for the entire year.

It should be noted, however, that in computing the expenses which would have been incurred had the Pacific region linkup and 48-State extension been in effect for all of 1975, average costs per package are multiplied by an estimated increased volume of 30,503,890 packages.

The average per package cost combines payroll and nonpayroll costs and consists of four elements, which are called pickup, central sort, feeder, and delivery. For any one package, there may be a number of sorts as it passes from terminal to terminal or there may be more than one feeder movement between terminals. Notwithstanding, for each of the four functions, respondents use the same estimated increased volume total of 30,503,890 packages. However, feeder expenses are adjusted to reflect the longer distances of the Pacific region linkup and the 48-State extension. Moreover, although some packages are brought by shippers to respondents' terminals for subsequent line-haul transportation, there is some pickup expense attendant to every package and in this sense, for every pickup there is a delivery. Accordingly, the basic variables in the package count of the extended operations volume relate to central sort and feeder. Respondents make the indicated adjustment for the greater feeder expenses attendant to the longer movements of the Pacific region linkup and the 48-State extension, but do not claim any greater expenses for the multiple number of sorts that may also be involved.

In summary then, the added annual expenses of the Pacific region linkup and the 48-State extension essentially are determined by estimating the number of additional packages to be generated yearly by the Pacific region linkup and the 48-State extension and by multiplying the total so obtained by the average 1975 per-package cost.

Certain adjustments made by the respondents to the nonpayroll costs should be mentioned. In constructing their study for the year ending March 31, 1971, respondents excluded consideration of costs attributable to management amounting to $38 million. They also computed the increased nonpayroll costs for the 3-month period, January 1, 1976 through March 31, 1976, which follows the base year and precedes the study year. For this 3-month period, they use a quarterly price increase factor of one-fourth of the 6.82 annual factor. The quarterly factor, 1.72 percent, is

applied to the 1975 adjusted base year nonpayroll expenses as is the annual factor of 6.82 percent in the study year computation. The following table shows respondents' computations.

TABLE 1

Increase in nonpayroll expense 12 months ending March 31, 1977

	Amount of increase
Adjusted base year operating expense	$1,470,664,510
Adjusted base year operating expense (excluding management expense)	1,432,604,159
Nonpayroll expense equals 31.15 percent of base year total expense	------------------
Nonpayroll expense ($1,432,604,159 x 31.15 percent)	446,256,196
Increase in nonpayroll expense due to estimated price increases during January-March 1976 ($446,256,196 x 1.71 percent)	7,630,981
Increase in nonpayroll expense due to estimated price increases during 12 months ending March 31, 1977 ($446,256,196 x 6.82 percent)	30,434,673
Total increase	38,065,654

There is assertedly no substantial difference between the intrastate and interstate operations of respondents, except that which is caused by a lack of operating authority in some States and the suspension or nonsuspension by various State jurisdictions of respondents' proposed 5-percent increase. Nonetheless, protestants object to the mixing of interstate and intrastate data. They assert that as much as 32.5 percent of the common carrier traffic of respondents is intrastate in nature. Protestants also note that the revenue derived from and the costs related to such traffic are about the same per package as for interstate traffic moving an equal distance.

Based on a 32.5 interstate percentage of traffic and respondents' system average per package costs, protestants deduce that respondents' operating ratio for intrastate traffic is about 118, while that for interstate traffic is around 80.

In addition, the Florida interveners argue that UPS (N.Y.) is conducting intrastate operations at a loss, pointing out that this respondent claimed to have lost over $8 million in New York State intrastate operations for the year ending June 30, 1974.

Relative to the foregoing, we note that for the year ending June 30, 1974, the total loss of UPS (N.Y.) both intrastate and interstate was over $10 million. However, for the year ending December 31, 1975, a profit of $11,045,000 is shown for UPS (N.Y.), notwithstanding a major strike by the New York City area employees of respondents.

Respondents appear to concede that there are locales where they operate at a loss. They also indicate that they attempt to bring about conditions which eliminate any such local losses. They additionally stress the importance to them of their uniform rate structure. They state at page 224 and 225 of the transcript as follows:

> Again, we were working on a uniform rate structure. We feel that we are one overall integrated operation. We don't think there is anything natural about a state versus a region or the whole United States. Our operation, you must take as a whole. If we extract out each state based on the costs of that state and each interstate movement upon the particular areas, we would just have a completely impossible rate structure.

And, I think, the Commission's economic division as I have indicated has recognized ourselves as a simple rate structure and it is simple only because it is uniform. I think that it would be entirely against the interests of the public to attempt to have each state with separate rates and different rates between each two states. And that is what you would get if you tried to isolate the cost of each state and make rates on the cost of that state and isolate other costs of going from New York to Massachusetts to Pennsylvania and have a different rate for that. If we attempted to isolate cost that is what we would end up with.

Respondents estimate that the Pacific region linkup and the 48-State extension have the ultimate effect of adding 318,378 packages a day to the system total. This estimate is based on an average of the initial 5 months (August through December) of 1975 during which both of the extended operations were in effect. The following table shows the packages per day which are attributed to the extended operations for which figures are available.

TABLE 2

Month	*Volume*
August 1975	237,397
September 1975	287,650
October 1975	318,372
November 1975	344,048
December 1975	406,868
January 1976	335,008

The month of January was not included in the 5-month average of respondents. However, a 5-year average of respondents' monthly traffic shows that historically, January is a low traffic month compared to most other months of the year. (Only February and July are lower.) Protestants calculate that as of July 1976, the average packages per day due to the Pacific region linkup and the 48-State extension should be in the range of 527,156 to 600,000 packages a day. Both of these figures assume a continuation of the upward growth of traffic due to the extended operations. Based upon the 600,000 figure, protestants theorize that for the 12 month ending July 1976, the average of packages resulting from the extended operations will be 424,899 a day.

Utilizing the foregoing, protestants reconstruct respondents' 1975 base year and arrive at revenues of $1,666 million, expenses of $1,494 million, net operating revenue of $172 million, and an operating ratio of 89.7. Except for the number of packages attributed to the Pacific region linkup and the 48-State extension, the protestants' and respondents' adjusted 1975 base years are constructed from the same underlying data.

In graphically developing the extended operation totals, protestants averaged the actual results of December 1975 and January 1976 in order to take into account seasonal factors. In any event, thereafter, protestants' projection assumes that the daily volume of added traffic from the extended operations will amount to about 440,000 packages in February, 475,000 in March, 510,000 in April, 540,000 in May, 570,000 in June, and 600,000 in July. The magnitude of this projection is apparent when it is noted that the ultimate July daily total of 600.000 amounts to more than 17 percent of the average of 3,500,000 packages per day actually handled by respondents in 1975 throughout their entire system.

In their brief, protestants do not retreat from their assumptions concerning the Pacific region linkup and the 48-State extension. They historically "normalize" the trend they see in the August through January extended operation daily totals and graphically produce a normalized daily package volume figure of 527,157, which they predict will be attributable to the extended operations as of July 1, 1976. In such light, they assert that their use of an average of 424,899 extended operation packages a day in reconstructing the respondents' 1975 base year is conservative.

Having adjusted the 1975 base year, protestants go on to project the revenue, expenses, and operating ratio of respondents for a study year ending July 1, 1976. They adjust payroll costs to reflect the wage rates which will be in effect on July 1, 1976, and project a 3.41-percent cost increase for nonpayroll expenses. Protestants' methods in this respect are not entirely the same as those of respondents. The major difference, of course, is that respondents' projections are carried 9 months further into the future. Also, protestants apply the higher labor costs, actual or constructed at 8 percent to be effective in July 1, 1976, as if they were in effect during their entire study year, whereas respondents claimed such increased costs occurring during their study year only for the period during which they would be effective. As to nonpayroll costs, protestants use a 3.41-percent, 6-month increase factor, one-half of the 6.82 percent annual increase factor used by respondents. The resulting projection thus attempts to reflect the increase in nonpayroll costs anticipated during the 6 months following December 31, 1975, but does not result in an annualization of the highest nonlabor costs which presumably will be in effect on July 1, 1976. Accordingly, while respondents' study year attempts to simulate the results of an actual year's operation giving effect to price increase only as they occur, protestants' study year is a hybrid year reflecting payroll expenses at their highest anticipated level for the entire study year but giving effect to its nonlabor cost increases essentially as they would occur throughout the study year. Without the benefit of the proposed rate increase and without any growth in traffic other than that which is attributed by protestants to the extended operation, the protestants theorize that for the year ending July 1, 1976, respondents' common carrier financial results will be, revenues $1,666 million; expenses $1,578 million; net operating revenue $88 million; and operating ratio 94.7.

Protestants next observe that between 1969 and 1974 respondents' average annual increase in the number of packages transported per year is 11.6 percent, and also note that the traffic volume in January 1976 was 18.5 percent greater than the traffic volume of January 1975, partially because of the effect of the extended operations. Protestants separate what they call "normal" gain in traffic from the gain in traffic due to the extended operations and come up with a "normal" gain in traffic of 7.9 percent, from January 1976 over January 1975. Carrying this one step further, they recompute their study year ending July 1, 1976, by adding revenue and expenses at 1975 levels and ratios which they believe would be generated by a "normal" gain in traffic of 7.9 percent. The financial results so derived produce revenues of $1,798 million; expenses of $1,661; net operating revenues of $136 million; and an operating ratio of 92.4. With the proposed increase, both interstate and intrastate, respondents' operating ratio produced by the study year as finally adjusted by protestants becomes 88.0

The actual growth in the number of packages transported by respondents in 1975 over that transported in 1974 was around 13.3 percent. Protestants' study year ending July 1, 1976, assumes a package level which is more than 20 percent greater than the year ending December 31, 1975.

Respondents do not claim that their volume for the 12-month period starting April 1, 1976, will of a certainty be only as great as that shown in their own projection. However, they assert that no one can predict at this time whether a greater increase will occur, or if it does, what the extent of such increase might be. They point out that no significant further territorial extensions are imminent and that new competition is developing, such as nationwide air parcel service by a carrier called Federal Express and recently authorized freight forwarder service by American Delivery Systems, Inc., which intends to provide nationwide small parcel distribution.

Respondents also point out that they will continue to be involved in a series of difficult labor negotiations involving issues other than money, which could culminate in major trouble. They fear that postal subsidies may be granted. Further, even though the national economy is improving, they do not believe that the effect thereof on their future volume is sufficiently certain to justify consideration here.

Respondents also argue that higher volume does not necessarily mean a better operating ratio. In this respect, as shown on table 3, their combined operating ratios have fluctuated both up and down between 1965 and 1975, during which time package volume increased dramatically. For comparative purposes, the table also shows the package volume and whether there was a rate increase and territorial increase during the year.

TABLE 3

Year	Packages (millions)	Rate increase	Territorial expansion	Operating ratio
1965	245	----------	----------	91.3
1966	281	Yes	Yes	94.0
1967	327	Yes	Yes	91.6
1968	356	Yes	Yes	90.2
1969	449	Yes	Yes	88.5
1970	494	Yes	[1]Yes	90.2
1971	547	Yes	Yes	87.3
1972	648	No	Yes	87.4
1973	732	No	No	92.9
1974	777	Yes	[1]Yes	93.2
1975	880	Yes	Yes	90.2

[1] Intrastate only.

In table 3, respondents show operating ratios, among others, for the years 1970 through 1973. Protestants submit data indicating that higher operating ratios were realized by respondents for those years. Protestants' data are 95.9 (1970), 94.2 (1971), 94.6 (1972), and 94.9 (1973). The difference between respondents' and protestants figures is accounted for by the fact that respondents pay UPSA an annual contract fee amounting to 4.5 percent of their operating revenue, plus 50 percent of their profits before taxes and the additional fact that prior to 1974, the full contract fee was charged to the operating expenses of respondents. This produced higher expenses and higher operating ratios for respondents than were actually warranted. Accordingly, after 1974, the only portion of the contract fee which was charged to the operating expenses of respondents was the actual cost of UPSA of rendering management services for respondents. In 1974, the amount allowed was 2.24 percent of respondents' total operating revenue and in 1975, 2.34 percent. Because of this new accounting treatment, respondents make similar adjustments for prior years, including 1970 through 1973. Therefore, protestants' figures are entirely reconcilable with those of respondents.

In further support of their contention that increased volume does not of itself produce lower costs and lower operating ratios, respondents refer to the data in table 4, which shows that their production per man-hour also has fluctuated up and down, with narrow limits, during the growth period from 1965 through 1975.

TABLE 4

Year	Total packages (000)	Percent increase	Total man-hours (000)	Packages per man-hour	Percent of change
1965	341,867		43,778	7.8	
1966	374,539	9.6	49,481	7.6	(2.6)
1967	408,624	9.1	55,409	7.4	(2.6)
1968	421,514	3.2	57,028	7.4	-0-
1969	513,752	21.9	71,027	7.2	(2.7)
1970	553,069	7.7	79,728	6.9	(4.2)
1971	607,542	9.8	85,360	7.1	2.9
1972	711,654	17.1	97,337	7.3	2.8
1973	797,552	12.1	110,120	7.2	(1.4)
1974	837,348	5.0	112,191	7.5	4.2
1975	930,055	11.1	120,892	7.7	2.7

Respondents also state that as volume increases, additional vehicles and drivers must be added, even if, as is usually the case, space is available in the existing vehicles. This is because pickup and delivery loads are dispatched according to the time required to do the work, not by the capacity of the vehicle.

With respect to feeders (transfer vehicles), most vehicles leave with full or nearly full loads, so that any significant volume increase would require additional vehicles, drivers, and trips. There could be some temporary saving in sorting costs per package at centers and hubs to the extent added volume could be accommodated in existing facilities, but many existing facilities already are overtaxed, and the company has embarked on a major program for enlarging present and constructing new buildings at much higher costs.

Also, the addition of vehicles, drivers and enlarged facilities carries with it the need for additional supervision and overhead expenses.

The protestants, of course, disagree with much of the foregoing. In this regard, it is helpful to recall that the revenue and the costs resulting from the increased volume of the Pacific region linkup and the 48-State extension are calculated by protestants upon the basis of per-package revenue figures and average per-package costs supplied by respondents. The operating ratio resulting from protestants use of respondents' data is 63.2. That is for every $100 of extended operating revenue, only $63.20 of expenses are assigned by protestants. Although both respondents and protestants use the same underlying revenue and cost data, the absolute expense and revenue totals produced by protestants for the extended operations are greater than those obtained under respondents' computations because the amount of traffic attributed by protestants to the extended operations is greater. In any event, protestants use the same 63.2-percent ratio in determining the expenses which they attribute to "normal" growth traffic. At the same time, protestants complain that the respondents have failed to take into account increased efficiency or productivity gains. Based on a study of annual reports of respondents, protestants conclude that for the years 1970 through 1974, respondents were able to increase the number of tons of freight handled by 72 percent while their number of employees increased only 52 percent. The study of protestants is set forth in the table next following.

TABLE 5

Productivity

UPS AND UPS-N.Y. COMBINED DATA FROM ANNUAL REPORTS

Item	1974 (1)	1970 (2)
Number of employees	64,134	42,200
Employees time:		
Days	----------------------------	1,119,356
Hours	116,926,262	72,431,694
Days x 8 hours	----------------------------	8,954,848
Total hours	116,926,252	81,386,542
Vehicle-miles	175,474,562	99,761,114
Tons	4,300,513	2,503,246
Ton-miles	2,352,317,367	1,120,162,428
Packages handled	776,952,863	494,095,856
Averages and indexes		
Packages handled/employee	12114.52	11708.43
Index	103.5	100.0
Packages handled/employee hour	6.64481	6.07098
Index	109.5	100.0
Pounds handled/employee hour	73.559	61.515
Index	119.6	100.0
Ton-miles/employee hour	20.11796	13.76349
Index	146.2	100.0
Ton-miles/vehicle-mile (average load)	13.41	11.23
Index	119.4	100.0

From the above, protestants urge that during the 4-year period from 1970 to 1974, respondents increased productivity at least 2.6 percent per year (packages per hour).

Respondents' table 3 and protestants' table 4 both show a gain in the number of packages per man-hour since 1970. However, respondents' table 3 shows an even greater number of packages per man-hour during 1965. Thus, productivity gains are not something which may be assumed with total certainty.

Respondents present evidence, as previously alluded to, of the average package costs per function, that is for pickup, central sort, feeder, delivery, and general, which total about $1.57 per package. Based thereon, the Florida interveners assert that any package returning a lesser amount of revenue loses money. Especially affected by this are lighter packages. In addition, a witness for the Florida interveners takes the position that the costs of handling parcels are incurred on a per-piece basis without regard to size or weight.

The Florida interveners thus conclude that revenues derived from heavier packages are used by respondents to offset losses incurred in the transportation of lighter packages.

Finally, relative to costs, the Florida interveners note that respondents attribute about $163 million in expenses during 1975 to the "pickup" function, which amounts to about 12 percent of respondents' operating costs. At the same time, the interveners note that respondents' derive only about 2.2 percent of their revenue from their weekly service charge. Application of 2.2 percent to 1975 totals produces revenue of approximately $33.6 million. Protestants point out that such an amount of revenue does not cover the cost of pickup, and that the remaining cost of the pickup function ($129.4 million in 1975) is treated by respondents as a cost to be recovered from all customers including those which deliver packages directly to respondents' terminals. During 1975, over 23 million packages were received by respondents at their terminals and protestants believe that the expenses attributable to the pickup function should be recovered solely from a pickup service charge.

Respondents' steadfastly maintain that the weekly service charge is not a pickup charge. They also state that pickup expenses are incurred even when a package is delivered directly to one of their terminals.

APPENDIX C

Respondents' projections of return on stockholders' equity and transportation investment relate to consolidated financial statements of UPSA. Protestants object to this upon the ground that UPSA is not a carrier regulated by this Commission and that consideration should be given only to the revenue needs of the common carrier respondents. Here, protestants indicate that the two respondents had a combined return on transportation investment of 60.9 percent and return on equity of 37 percent in 1975.

Beyond their general arguments that the financial returns of the parent holding company are not germane to the revenue need issue in this proceeding, protestants argue that certain of the assets of UPSA should not in any event be considered in determining the total of shareholders' equity. Among the assets, items which protestants find objectionable are over $93 million in (short-term) investments which UPSA holds. Protestants argue that UPSA must be receiving about 8-percent interest on these funds for which it has not yet found a transportation use.

Protestants also believe that the stock bonus of 15 percent of calculated profits which is paid to the key employees should not be listed as an expense and that actual profits are 15 percent higher. Also, in this regard, treasury stock of $31 million purchased by UPSA from former employees and to be distributed to current employees should not be listed as an asset in the view of protestants.

Protestants additionally assert that shareholders' equity should be reduced by deferred Federal income tax and deferred investment tax credit which have been claimed by UPSA.

An unaudited combined balance sheet of UPSA and Service Plants Corporation shows shareholders' equity of $420,477,916 as of December 31, 1975. However, for the purposes of this case, in computing the rate of return on shareholders' equity for the 12 months ending March 31, 1977, respondents show a combined UPSA and Service Plants Corporation shareholders' equity of $518,609,000 and return on shareholders' equity of 7.0 percent without the proposed rate increase.

In bolstering the $420 million equity figure to $518 million, respondents converted the equity figure of $420 million to $472,609,196 as of December 31, 1975, and then added anticipated profits up through March 31, 1977. In making the conversion of the 1975 equity figure, respondents added deferred Federal income tax of $36,219,000 and deferred investment tax credit of $15,932,000. These two items totalling about $52 million are listed as liabilities on their unaudited balance sheet and, of course, the shareholders' equity shown thereon is reduced accordingly.

Protestants would not allow that addition of $52 million to the $420 million equity figure. In addition, they would subtract therefrom all or part of $93,481,228 in short-term investments and $31,506,751 in treasury stock, as previously alluded to, which together total about $125 million. Even on the basis of the $420 million figure, protestants, with corrections, would compute the combined UPSA return on stockholders' equity for the year ending December 31, 1975, to be 23.33 percent and return on transportation investment to be 36.01 percent.

For the year ending December 31, 1975, the combined revenue of UPSA and Service Plants Corporation was $1,614,936, expenses were $1,449,110, net operating income was $165,826,000, net operating income before taxes was $168,359,000 and net income after the deduction of current and deferred Federal income taxes was $90,745,000. The operating ratio was 89.3. Protestants would reduce the expenses claimed by the amount expended for the purchase of treasury stock for use in UPSA's employee bonus plan. Such a subtraction also would reduce the operating ratio to an even more favorable level.

Concerning the various foregoing criticisms made by protestants, respondents argue that UPSA's short-term investment account is not excessive, especially since all of the facilities necessary to handle properly the large influx of volume from the 48-State extension were not acquired in 1975 and that more than $100 million of capital investment is planned for 1976. Also, respondents again stress that they are susceptible to labor stoppages of undeterminable duration, and asserts that a cash reserve equivalent to 1 month's revenue is on the low side. Further, respondents wish to maintain an ample cash reserve so as to avoid substantial borrowing of funds.

Respondents argue that amounts paid to managers and supervisors by way of incentive compensation and used to buy UPSA stock, over and above their base pay, are properly included as an item of cost. They also say that stock purchased from retired shareholders and held temporarily as treasury stock for purchase by employees under the incentive plan should be treated as an asset. Here, they note that protestants' expert witness concedes that the total compensation paid officers of respondents, including incentive payments, is not excessive. In addition, respondents attribute a great proportion of their success in maintaining efficiency and service standards while undergoing tremendous expansion to the partnership concept said to be fostered by the incentive plan.

As to protestants' contention that no consideration should be given to the financial returns of UPSA, respondents state that if borrowing were necessary, it would be done by UPSA, and that if it were necessary to attract equity capital, UPSA would be the one to do it. Further, respondents point out that the revenues generated by them constitutes 95 percent of UPSA's total revenues, and that the great proportion of the investment in land and buildings used by respondents is held by UPSA or real estate subsidiaries formed for that purpose, or real estate subsidiaries of Service Plants Corporation, the stock of which is held in trust for the benefit of UPSA shareholders. Respondents believe that if only their own equipment is considered, it would be necessary to capitalize all leases with affiliated companies and to add that to equity before computing the return. They contend that the equivalent result is accomplished here by using the combined figures for UPSA and Service Plants Corporation, and comparing the return with the combined total.

Finally, concerning the handling of deferred income taxes and investment tax credits, respondents state that for purposes of this case, a so-called flow-through method of accounting is used in projecting after-tax earnings of UPSA for the 12-month period commencing April 1, 1975. As a result, only the taxes paid currently are reflected in the UPSA study and net profits are not reduced by the amount of deferred taxes. This results in higher after-tax earnings being shown than if "normalized" accounting were used. Stated differently, the tax saving is treated as a current profit. Having done this, respondents believe that, as to their study year, deferred income taxes and investment tax credits should not be treated as a future liability in reduction of shareholders' equity. Respondents assert that if realized tax savings are, in effect, added to annual income, then equity must reflect the accumulation of such annual earnings. It would seem that a consistent accounting method should be used in determining the relationship of current earnings to shareholders' equity. Accordingly, referring back to the approximately $52 million of deferred taxes, it appears that under flow-through accounting the $52 million amount would be deleted as a liability, thereby expanding by a like amount the equity section of the UPSA balance sheet. In actuality, the argument here, between the parties, is not one over figures, but whether it is at all proper to use flow-through accounting in determining return or shareholders' equity.

APPENDIX D

We used the square root of 1.0682 because respondents calculated only the average *annual* increase in nonlabor expenses, not the average semiannual increase. The updating of the 1975 nonlabor expenses was performed in two steps. The first involved updating to the yearend 1975 level, and the second, to the July 1, 1976, level. This procedure effectively separates the annual increase factor into two equal semiannual increase factors.

If the nonlabor expenses for 1975 were $100 and the yearend level were 3.35 percent greater than the average 1975 level, the comparable expenses at the yearend level would equal $103.35. We would again increase those expenses by 3.35 percent to update them to the July 1, 1976, level. At the July 1, 1976, level the comparable expenses would equal $106.82 ($103.35 times 103.35 percent).

The common mistake in updating nonlabor expenses in 6-month intervals when the update factor is based on a 12-month period is to divide the update factor in half. If that were done in this case, instead of 1.0335, the update ratio would be 1.0341. Squaring that ratio would produce an annual nonlabor expense update factor of 1.0694, which is greater than respondents' actual annual update factor of 1.0682. Thus to divide 1.0682 in half and use 1.0341 as the semiannual update factor overstates the updated nonlabor expenses.

No. 35358

A. LINDBERG & SONS, INC. v. CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY, ET AL.

Decided January 17, 1977

Rates charged on shipments of bentonite clay, in bulk, from Upton, Wyo., and Belle Fourche, S. Dak., to Groos, Mich., commencing September 14, 1970, found to have been and to be unjustly discriminatory in violation of section 2 of the act. Unjust discrimination ordered removed, reparation awarded, and the proceeding discontinued.

Aaron Lowenstein for complainant.

H. C. Pierson, Charles H. Clay, and *William F. Cottrell* for defendants.

James A. Tranter for intervener, American Colloid Company, as its interest may appear.

REPORT AND ORDER OF THE COMMISSION ON RECONSIDERATION

BY THE COMMISSION:

The modified procedure was followed. The prior Decision and Order by Review Board Number 4, reported at 343 I.C.C. 469 (1972), affirmed and adopted, with minor changes, the statement of facts, conclusions, and findings of the hearing examiner, subsequent to the filing of exceptions by complainant to which the defendants replied, and dismissed the amended complaint involved herein. The hearing examiner found the assailed rates[1] charged on shipments of bentonite clay, in bulk, from Upton, Wyo., and Belle Fourche, S. Dak., to Groos, Mich., commencing September 14, 1970, not shown to have been or to be unjust and unreasonable, unjustly discriminatory, or otherwise unlawful, and the amended complaint was dismissed. Subsequent to a denial by Appellate Division 2 of its petition for reconsideration, A. Lindberg & Sons, Inc. (Lindberg or complainant), instituted a civil action in the United States District Court for the Western District of Michigan, Northern Division, seeking to have the court vacate and set aside the aforesaid Decision and Order of the Commission. While the court affirmed the Commission's findings and conclusions that sections 1(5) and 3(1) of the Interstate Commerce Act had not been violated by the defendant railroads,[2] it held that the Commission erred in its interpretation and application of section 2 of the act. *A. Lindberg & Sons, Inc.* v. *United States*, 408 F. Supp. 1032 (W.D. Mich. 1976). The court also concluded that the Commission's decision was based on findings not supported by the evidence of record and that the decision was, therefore, arbitrary under the provisions of the Administrative Procedure Act, 5 U.S.C.A. §554. In accordance with the written opinion of the court, so much of the order of the Commission as denied relief under section 2 of the act was vacated, and the cause was remanded to the Commission for further proceedings not inconsistent with the court's opinion. By order of the Commission on the 18th day of May, 1976, the proceeding was reopened for further consideration of that portion of the complaint alleging a violation of section 2 of the act.

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[1] Unless otherwise indicated, rates are stated in amounts per net ton of 2,000 pounds.

Since the facts were adequately stated in the initial decision, they are restated here only insofar as is necessary for a proper understanding of the issues. Contentions of the parties and requested findings and conclusions not specifically discussed or reflected in this report have been considered and found not justified. Our findings and conclusions differ from those of Review Board Number 4 with respect to the section 2 issue.

By complaint filed December 18, 1970, as later amended, Lindberg, of Ishpeming, Mich., which is engaged in highway and heavy construction business, alleged that the rates charged and to be charged by the defendant railroads on movements of an estimated 8,720 tons of bentonite clay from Belle Fourche, S. Dak., and Upton, Wyo.,[3] to Groos, Mich., were, are, and will be unjustly discriminatory in violation of section 2[4] of the act by virtue of the defendants' refusal to extend to Lindberg the reduced rates offered to certain taconite plants.

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[2] Chicago and North Western Transportation Company (North Western), Escanaba and Lake Superior Railroad (Escanaba), and Soo Line Railroad Company (Soo).

[3] Burlington Northern, Inc., is the only carrier serving Upton but was not named as a defendant. However, complainant joined only those railroads that billed it for the movements involved.

[4] Section 2 of the act provides "That if any common carrier subject to the provisions of this part shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this part, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination which is hereby prohibited and declared to be unlawful."

The basic and controlling facts are that the same type of high-swelling bentonite was transported both for certain taconite plants and for Lindberg, all of which are located in Michigan's upper peninsula, from precisely the same point of origin over the same route in the same type of special hopper cars in full carloads only. Lindberg's loaded hopper cars were hauled in the same train movements with hopper cars of bentonite destined for the taconite plants, but Lindberg's cars were set off at Groos in Delta County, Mich. The evidence also shows that although the weight of each carload ordered by Lindberg from American Colloid Company substantially exceeded the 140,000-pound minimum requirements for receipt of the lower rate, the higher rate was actually charged. For example, on cars transported for Lindberg weighing approximately 186,600 pounds, the higher rate was charged by defendants; yet on hopper cars of the same approximate weight destined to the taconite plants, the lower rate was charged. Moreover, the hauls to the taconite plants over the same route and in the same rail movements were approximately 1,450 miles as compared with 1,400 miles on complainant's movements. Thus, the only meaningful difference in the movements is that the Lindberg traffic was transported to a destination 50 miles *closer* to the point of origin. The commodity involved (unique, high-swelling, Black Hills bentonite) was identical. Yet, in 1970 the transportation charges for hauling to Lindberg were $706.38 more per hopper car, and in 1971, $771.14 more per car than the charges on movements to taconite plants located 50 miles farther. Refusal by the defendants to establish an equal rate for complainant caused Lindberg to pay in excess of $66,886.68[5] over the amount charged taconite plants for the same volume hauled.

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[5] Apportionment of complainants pecuniary injury from defendants' violation of section 2 of the act.

	1970	1971	Total
North Western	$13,913.92	----------	$13,913.92
Escanaba	18,028.26	29,483.66	47,511.92
Soo	5,460.84	----------	5,460.84
	37,403.02	29,483.66	66,886.68

For the movements in issue, the rate sought by complainant was that applicable on movements from Belle Fourche to pelletizing plants in Minnesota, Michigan, and Wisconsin, at the time $12.98,[6] a rate the carriers allegedly established to meet the competition of import clay. Rates to the taconite plants in Michigan and Minnesota from all origins were equalized without regard to distance in order to permit the pelletizing plants to compete on equal terms for the steel market.

In 1964 interested steel and iron ore companies joined together to apply for a special lower rate for the shipment of bentonite to taconite plants located in Michigan and Minnesota. In the iron ore pelletizing industry bentonite is used to produce iron ore pellets extracted from the high-grade taconite found in Minnesota and Michigan. Approximately 1 net ton of clay is used in the production of 125 long tons of pellets. In 1969, 363,219 net tons of clay were consumed by the pelletizing industry, and the lower proportional rates are designed to encourage increased use of bentonite clay at the pelletizing plants in the Upper Peninsula of Michigan.

Complainant additionally maintains that defendants' alleged justification of reduced rates to the Upper Peninsula Michigan plants to meet foreign competition is without foundation because in 1964 imported foreign bentonite amounted to 179 tons, but by 1969 foreign imports of this commodity had fallen to 76 tons. On the other hand, complainant introduced evidence showing that domestic production of bentonite increased from 1.9 million tons to 2.6 million tons for the same period. Complainant, therefore, contends that import competition could not have been a substantial factor in the establishment of reduced domestic rates for movement of the involved commodity to points in the Michigan Upper Peninsula and excluding complainant from participation therein.

Furthermore, Lindberg introduced into evidence a letter dated May 19, 1970, which it received from the Johns-Manville Company (Johns-Manville) in response to an inquiry concerning the supply of the required clay. It states in pertinent part:

> Referring to our letter of quotation on supply of Bentonite, we have now learned from the Railroad that if we give them notice within the next two weeks we are assured of a

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[6] As of September 14, 1970, the proportional rate from Belle Fourche to the pelletizing plants was published in the amount of $10.70, subject to an Ex Parte No. 262 increase of 5 percent under tariff X-262 and an Ex Parte No. 265 interim increase of 5 percent under tariff X-265-A, which made it $11.91. On November 20, 1970, the Ex Parte No. 265 increase became 6 percent (in tariff X-265-B) and an Ex Parte No. 267 interim increase of 8 percent was imposed (in tariff X-267-A); as a consequence, on November 20, 1970, the rate was increased from $11.91 to $12.98.

freight rate of $11.34 per ton for this movement, rather than the $18.60 shown in our quotation letter.

It was claimed by Lindberg that in reliance upon this letter it submitted a bid on the Mead job[7] which reflected its belief that its freight rate would be $11.34 per net ton, the rate applicable on movements to the taconite plants. Defendants, however, deny knowledge of any commitment to establish a lower rate to Groos. Additionally, they point out that no such rate proposal was ever docketed, as required, with Western Trunk Line Committee and that the reduced rate was never established for the complainant.

DISCUSSION AND CONCLUSIONS

The substance of section 2 is unjust discrimination in the rates and charges for railroad service. There must be proof of the charging of different rates for like and contemporaneous service in the transportation of like kinds of traffic under substantially similar circumstances and conditions. The purpose of section 2 is to enforce equality of treatment between shippers of like commodities over the same line or haul for relatively similar distances and between the same points. In achieving this, we are not precluded from treating all places within a particular group or district as one origin or destination point for ratemaking purposes. *Ayrshire Collieries Corp.* v. *United States*, 335 U.S. 573, 583 (1949).

We have heretofore recognized that commodity rates on bentonite clay from Belle Forche are blanketed over wide geographic areas and bear little relation to distance. For example, as we noted in *American Colloid Co.* v. *Akron, C. & Y.R. Co.*, 321 I.C.C. 91, 95 (1963), a commodity rate of 79 cents per unit of 100 pounds applied from Belle Fourche for distances ranging from 626 to 992 miles or a difference of 366 miles, while the classs 100 rates ranged from 370 to 482 cents for these distances. Similarly, a commodity rate of 126 cents per unit of 100 pounds applied on representative movements for distances ranging from 1,728 to 2,051 miles or a difference of 323 miles, while the class 100 rates for these distances ranged from 690 to 781 cents. The facts presented in the instant proceeding show that Groos, Mich., the destination point of complainant's bentonite shipments, is 50 miles *closer* than the point of destination of the other shipments, all of which move at the substantially lower blanket rate.

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[7] The Mead Corporation in Groos, Mich., had contracted for the construction of a sediment pond to serve a pulpmill.

The provisions of section 2 of the act do not require a showing that the involved movements are made under identical conditions or between identical points. All that is required is a showing of like service and traffic under *substantially similar* circumstances and conditions, as has been made herein by the complainant. And while every disparity in rates or charges on a given commodity is not unjustly discriminatory *per se*, charging Lindberg a far greater rate than that charged the less proximate taconite plants for "* * * a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions * * *" clearly constitutes unjust discrimination, which is prohibited and declared to be unlawful pursuant to the provisions of section 2 of the act, 49 U.S.C. §2.

Defendants' contention that the difference in rates was justified by the threat of potential competition from imported bentonite is contrary to the evidence of record. The evidence shows that bentonite produced in the Belle Fourche area was in many ways of higher quality than European bentonite and that, in any event, foreign imports were *de minimis* when compared with the production thereof within the United States. In 1964, 179 tons of foreign bentonite were shipped to the United States, whereas 1.9 million tons were produced within the United States. By 1969, foreign imports had fallen to 76 tons, whereas production within the United States had risen to 2.6 million tons.

In justification of the rate differential it was also alleged that the lower rates are designed to encourage increased use of bentonite clay at pelletizing plants located in the depressed area of the Upper Peninsula of Michigan. There is, however, no evidence to support such a finding. Even assuming that were the fact, the lower rates would apply with equal force to shipments of the involved commodity to Groos, which is also located in the Upper Peninsula of Michigan.

The defendant railroads indicate that the principal justifications for the distinction between the lower shipping rates charged the taconite producers and the higher rates charged other shippers are the taconite producers' economies of volume, as well as the fact that the taconite plants furnish the defendants with other business. Where cost economies are reflected for volume shipments, a difference in rates may be warranted. But, as heretofore indicated, no cost evidence has been introduced into the record. Furthermore, offering a lower rate on the basis of the size of the shipper or receiver or its ability to furnish additional business is an improper justification for maintaining different rates for shippers similarly situated. See *Southern Motor Freight Tariff Ass'n.* v. *United States*, 273 F. Supp. 823 (D. Del. 1967).

We recognize that to prove damages Lindberg must show injury. We cannot, however, accept as determinative of the actual amount of damages, Lindberg's claim of lost profits, based upon its reliance on the Johns-Manville letter. While the authenticity of the letter is undisputed, the content is in essence hearsay. Furthermore, there is no evidence of record as to the identity of the railroad, the correspondent, or the particular movement referred to in the letter. Similarly, it was not shown that the alleged reliance upon the reduced rate was induced by any representations on the part of the defendants.

It is, however, indisputable that Lindberg's shipments were subjected to rates which were much higher than those applicable on shipments to the taconite plants on movements from the same origin over identical routes—with the only difference being that Lindberg's shipments were, in fact, shorter. Under such circumstances, we find the rate applicable on Lindberg's shipments to have been discriminatory, the charges assessed thereunder to have been unlawful, and the measure of damages to be the difference between the charges actually assessed and those which would have been assessed if the substantially lower rate applicable on movements to the taconite plants also had been available to Lindberg.

We, therefore, find and conclude that the rates charged on shipments of bentonite clay from Upton, Wyo., and Belle Fourche, S. Dak., to Groos, Mich., commencing September 14, 1970, were unjustly discriminatory in violation of the act to the extent that they exceeded $11.91 per ton in 1970 and $13.46 in 1971; that complainant made the described shipments and paid and bore the charges thereon at the rate herein found to be unjustly discriminatory; and that it was damged thereby and is entitled to reparation in the amount of $66,886.78, plus interest of four (4) percent per annum.

We further find that this decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

COMMISSIONER MURPHY did not participate.

It is ordered, That defendants Chicago and North Western Transportation Company, Escanaba and Lake Superior Railroad, and Soo Line Railroad Company be, and they are hereby, required to remove the unjust discrimination herein found to exist.

It is further ordered, That defendants Chicago and North Western Transportation Company, Escanaba and Lake Superior Railroad, and Soo Line Railroad Company be, and they are hereby, required to pay reparation in the amount of $66,886.68, plus interest of four (4) percent per annum, to the complainant, A. Lindberg & Sons, Inc.

And it is further ordered, That this proceeding be, and it is hereby, discontinued.

No. 35301

WEST VIRGINIA INTRASTATE FREIGHT RATES, 1970

Decided January 14, 1977

Determination that the Commission order in prior report 344 I.C.C. 536, directed that West Virginia intrastate rates be raised corresponding to ex parte increases in the eastern territory. Proceeding discontinued.

Appearances as shown in prior report, and in addition: *Harry H. Babcock, Ilene Chase Gregg,* and *C. C. Rettberg, Jr.,* for respondents.

Charles W. Chapman for a protestant.

Thomas N. Hanna for Public Service Commission of West Virginia.

REPORT AND ORDER OF THE COMMISSION ON FURTHER HEARING

BY THE COMMISSION:

The modified procedure was followed. Exceptions to the initial decision upon reopening were filed by the rail carriers[1] (respondents), and a joint reply was filed by protestant, National Steel Corporation (National) and by the Public Service Commission of West Virginia (West Virginia Commission). Our findings and conclusions differ from those recommended by the Administrative Law Judge. Exceptions and requested findings not discussed in the report nor reflected in our findings or conclusions have been considered and found not justified or their resolution not necessary for the proper disposition of this proceeding.

The basic facts were set forth accurately and in detail by the Administrative Law Judge in the initial decision. Consequently, they will be restated in this report only insofar as necessary for a proper understanding of the issues.

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[1] The Baltimore and Ohio Railroad Company, Beech Mountain Railroad Company, The Chesapeake and Ohio Railway Company (C&O), The Kanawha Central Railway Company, Kelley's Creek and Northwestern Railroad Company, Norfolk and Western Railway Company (N&W), Penn Central Transportation Company (Penn Central), Western Maryland Railway Company, West Virginia Northern Company, and Winifrede Railroad Company.

In the prior report, 344 I.C.C. 536, decided by Review Board Number 4 on January 8, 1973, the board found that the West Virginia intrastate rates and charges imposed by the authority of that State were unduly low and were not contributing their fair share of the earnings required to enable respondents to provide adequate and efficient transportation services. To remove the unlawfulness found to exist therein, the respondents were ordered as follows:

> The unlawfulness herein found to exist should be removed by applying to the West Virginia intrastate rates and charges the same respective increases as are maintained by the respondents on like interstate freight between points in West Virginia and points in adjoining States, as permitted in Ex Parte Nos. 262, 265, and 267.

Ex Parte No. 262, *Increased Freight Rates, 1969,* 337 I.C.C. 436, effective November 18, 1969, authorized a general increase of 6 percent. Ex Parte No. 265, *Increased Freight Rates, 1970 and 1971,* 339 I.C.C. 125, effective June 9, 1970, authorized a general increase of 6 percent. Ex Parte No. 267, *Increased Freight Rates, 1970 and 1971,* 339 I.C.C. 125, effective April 12, 1971, as pertinent hereto, authorized not more than a 14-percent increase for intraterritorial traffic within the East, not more than 6 percent increase for intraterritorial traffic within the South, and not more than a 12-percent increase for interterritorial traffic between the East and South. However, under Ex Parte No. 267, the railroads did not take the maximum 12-percent increase authorized for coal *from East to South* but have held down the coal increase to only 8 percent.

Judicial review of the review board's decision resulted in its affirmation in *Public Service Commission of West Virginia* v. *United States,* 365 F. Supp. 6 (1973). Following the district court's decision, there was still a controversy concerning the amount of the increase to be applied to West Virginia intrastate coal rates. In order to clarify the amount of increase in intrastate rates deemed required the Commission, Division 2, Acting as an Appellate Division, struck the aforementioned quoted ordering paragraph and substituted the following by order dated December 21, 1973:

> The unlawfulness herein found to exist should be removed by applying to the West Virginia intrastate rates and charges the same respective increases as are and for the future may be maintained by the respondents on like interstate traffic to, from, or through West Virginia under Commission authorization in Ex Parte Nos. 262, 265, and 267, provided, that increases may not be made in intrastate rates to levels higher than the interstate rates on like traffic to or from West Virginia for like short-line distances over the same lines of railroad.

The division's substituted order did not resolve the controversy with respect to coal traffic. Respondents applied increases totalling 28.1 percent on coal to the West Virgina intrastate traffic which corresponded to Ex Parte Nos. 262, 265, and 267 increases made in the eastern territory.[2] Various shippers objected to the amount of such increases and contended that respondents should have applied a lower compounded "total" intrastate rate increase of 21.3 percent[3] corresponding to that taken by the carriers in Ex Parte Nos. 262, 265, and 267 on traffic moving from certain points in West Virginia to points in Southern territory. The source of the difference in the total compounded ex parte increases on coal between eastern and southern territorial traffic emanates from the fact that the carriers imposed different amounts of the Ex Parte No. 267 increases by territory.

Subsequently, both respondents and protestant filed petitions with this Commission seeking clarification and modification, respectively, of the above-appearing Commission's order of December 21, 1973. In response to those petitions, Division 2, Acting as an Appellate Division, by order dated November 27, 1974, reopened the proceeding for the sole purpose of determining whether the total 28.1-percent increase in intrastate rates, representing corresponding ex parte interstate rate in eastern territory was proper in view of the fact that respondents allegedly increased certain interstate rates on coal a total of only 21.3 percent between West Virginia and the South.

On further hearing, among other evidence, National presented a 1969 traffic study of 224 carload intrastate shipments of various commodities such as sand, wheat, flour, pipe or tubing, and chemicals. It contends the maximum rate increases ranging up to 12 percent[4] should apply on this traffic because "like traffic" moves from West Virginia to points in southern territory including certain distant points in Kentucky and Virginia which are in southern territory.

Protestant pointed out that in many instances respondents have reduced the *basic* interstate coal rates on shipments to the South, regardless of the fact that tariff X-267-B uniformly applies an 8-percent increase to the underlying commodity rate tariffs. On single-car shipments in 1973 prior to September 1, an exhibit shows 22 shipments from West Virginia origins on which the basic rates were reduced by percentages ranging from 6 to 41 percent. Respondents replied that these coal rates were reduced to meet various types of carrier and market competition such as barge, motor carrier, nuclear power, oil, and gas.

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[2] The 28.1-percent increase sought by respondent railroads is a compounding of the 6-percent Ex Parte No. 262 general increase, the 6-percent Ex Parte No. 265 general increase and 14-percent Ex Parte No. 267 general increase on coal intraterritorially in eastern territory.

[3] The 21.3-percent increase sought by protestants is a compounding of the 6-percent Ex Parte No. 262 general increase, the 6-percent Ex Parte No. 265 general increase and the Ex Parte No. 267 8-percent general increase on coal from the East to the South.

[4] This is the 12-percent maximum increase authorized in Ex Parte No. 267 for interterritorial traffic.

In reply, respondents denied that "like" traffic is the traffic moving from West Virginia origins to southern territory. They submitted a table showing that the coal shipments originating on the C&O destined to southern territory range from 8.4 to 16.1 percent of the total coal tonnage originating on the C&O in West Virginia destined to all territories and including intrastate shipments. Similar evidence for all coal shipments originating on the N&W shows that in 1974 about 5.6 percent of the total was transported to destinations in southern territory.

The Administrative Law Judge concluded that the cumulative 28.1-percent increase in intrastate traffic was not proper since the respondent railroads had not actually maintained that percentage on interstate movements. He indicated that where interstate rates have been subjected to increases less than those authorized, intrastate rate increases will similarly be restrained, citing *Arkansas Intrastate Frt. Rate and Charges—1972,* 349 I.C.C. 9, at 17. We note that the Administrative Law Judge did not specify what was the proper level of rates to be applied to West Virginia intrastate traffic.

On exceptions filed to the initial decision, respondent railroads contend that the Administrative Law Judge erred in failing to find (1) that the interstate traffic within eastern territory is "like" West Virginia intrastate traffic; (2) that the traffic between West Virginia and southern territory is not "like" West Virginia intrastate traffic; and (3) that respondents have in fact applied the full amount of the Ex Parte Nos. 262, 265, and 267 rate increases to traffic moving to the East and that the application of these three increases on West Virginia intrastate traffic removed the unlawfulness found to exist. Respondents also contend that the Administrative Law Judge erred in not stating the reasons and basis for his findings and conclusions as required by the Administrative Procedure Act, and in not prescribing the "proper" increase. Furthermore, respondents contend that the Administrative Law Judge erred in failing to grant its motion to strike protestants' reply statement showing a new cost study.

Respondents insist that protestant, National Steel Corporation, has failed to show that traffic between West Virginia and the South is "like" interstate traffic. They argue that protestant's car-mile and ton-mile earnings and cost/revenue comparisons on movements within West Virginia and between West Virginia and the South do not show that the traffic is "like" since the difference in distances involved as well as the fact that West Virginia-South traffic moves in joint-line hauls as opposed to single-line hauls for West Virginia intrastate traffic.

As evidence of the fact that West Virginia is like interstate traffic in the East, respondents point out that Note 24 of the master tariffs defines West Virginia as within the East. Furthermore, respondents argue that the history of past increases dictates that West Virginia traffic should be subject to the increases granted for interstate traffic within the East. Also they point out that the predominant intrastate traffic in West Virginia is coal and that the C&O and N&W together originated almost 52 million tons within the State of West Virginia, and of this tonnage, less than 10 percent for the C&O and less than 6 percent for the N&W moved to the South. Consequently, respondents argue that the effect of applying West Virginia-South increases would be to place West Virginia intrastate coal shippers in a more favored category than over 90 percent of West Virginia interstate shippers.

In reply, protestant denies that respondents have in fact applied the cumulative 28.1 percent rate increase "across the board" to traffic moving from West Virginia to eastern territory. It also contends that the traffic moving from West Virginia to the South is more representative of West Virginia interstate traffic, and thus it argues that there are no errors in the conclusions reached by the Administrative Law Judge. Furthermore, protestant argues that while West Virginia points are defined as within eastern territory in Note 24, they are also defined as within southern territory in other tariff notes (Note 15). In addition to National's arguments, the West Virginia Commission contends that a total 28.1-percent increase in that State's intrastate rates discriminates against West Virginia industries in favor of the industries in neighboring States. With reference to the coal rates as a compromise, it suggests that the Commission prescribe a 20-percent increase on the intrastate coal rates.

DISCUSSION AND CONCLUSIONS

As a preliminary matter, we will consider respondents' exceptions to a ruling of the Administrative Law Judge in which he denied their motion to strike certain evidence of National presented in its reply statement. The evidence complained of consists of certain cost data, and ratios of revenues to costs, which were offered to counter respondents' arguments that the cost evidence submitted by National in its original statement was defective. However, the cost evidence complained of does not rebut any specific evidence presented by the respondents. Instead, it constitutes an attempt to correct certain deficiencies in National's original cost presentation and thus the cost evidence is supplemental rather than rebuttal as required by rule 49 of this Commission's General Rules of Practice. Accordingly, we hereby overrule the ruling of the Administrative Law Judge, and grant the motion to strike the evidence complained of in National's reply statement. See *Sugar, Beet or Cane, New Orleans, La., to Columbus, Ga.*, 316 I.C.C. 230, 231.

This proceeding was reopened to determine whether the Commission's order authorizing an increase in West Virginia intrastate rates on coal corresponds either to ex parte increases on (1) interstate traffic from West Virginia to the East (eastern intraterritorial traffic), or (2) interstate traffic from West Virginia to southern points (interterritorial traffic between East and South). While the protestant's appearance in this proceeding was for the purpose of challenging the cumulative 28.1-percent increase on coal movements within West Virginia, we note that on commodities other than coal, there are also differences in the amount of West Virginia intrastate rate increases allowable depending on whether West Virginia intrastate traffic is considered "like" eastern or southern territorial traffic.[5] Accordingly, any determination of "like" interstate traffic to, from, or through West Virginia applies not only to coal traffic but to West Virginia intrastate traffic in general.

Determination of "like" interstate traffic to, from, or through West Virginia requires analysis of both the governing tariff and the character of the interstate traffic. Since it is the Ex Parte No. 267 increase which produces the differences found between territories, it is appropriate to consult that master tariff[6] to obtain an understanding of the various territorial boundaries.

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[5] Generally, tariff X-267-B provides for a 14-percent increase within the East and a 12-percent increase between the East and the South. From certain West Virginia stations, identified in Note 15 of the tariff, the railroads have only taken an increase of 6 percent on commodities other than coal when moving between those stations and the South.

Note 24 of master tariff X-267-B describes eastern territory. As pertinent to this proceeding, Note 24 places all stations in West Virginia in eastern territory as well as specified stations in the adjoining States of Kentucky and Virginia. The Kentucky stations which are eastern territorial points include the points in that State on the C&O and N&W whereas the Virginia stations in eastern territory are generally all points in that State located on and north of the N&W line from Bristol, Tenn.-Virginia, to Norfolk, Va. (a few N&W points south of this line are also in eastern territory). The eastern territory portions of Kentucky and Virginia encompass the area of those States *immediately adjacent* to West Virginia. The southern boundary of eastern territory as defined by this note is, therefore, beyond the border of West Virginia.

As indicated, Review Board Number 4's initial order decided January 8, 1973, directed respondents to apply increases as are maintained by the respondents on like interstate freight between points in West Virginia and points in *adjoining* States. Later, because of the controversy concerning the amount of the total increases (whether eastern intraterritorial or east-south interterritorial increases were applicable), the Commission described what they meant by "like" traffic in more detail by directing that the intrastate rates be raised to levels no higher than the interstate rates on "like traffic to or from West Virginia for short-line distances over the same lines of railroad."

After examining the pertinent governing master tariff and for reasons hereafter stated, it is clear that our use of the adjective "like" in modifying "interstate traffic" referred to interstate traffic within eastern territory. This conclusion is reached because under Note 24 of tariff X-267-B, West Virginia stations are considered in eastern territory, with the exception of those designated in Note 15 of said tariff which will be subsequently explained. Moreover, the traffic from West Virginia moving interstate to points in the northern part of the adjoining States of Kentucky and Virginia is also eastern intraterritorial traffic.

"Like interstate traffic" is traffic that most resembles the intrastate traffic. In the instant proceeding, the shortest interstate traffic from West Virginia over the carriers' lines to Southern States are to points in northern Kentucky and northern Virginia that are considered in eastern territory. While it is true that West Virginia railroads move coal traffic to other more distant points that are part of southern territory, such traffic is not "like" interstate traffic for four reasons. First, because of the longer distances involved the costs associated with such traffic is less likely to be as representative of West Virginia intrastate traffic as shorter distances. Second, West Virginia intrastate traffic is primarily single-line whereas West Virginia-South traffic is normally joint-line. Third, there is a substantial volume of coal moving between points in West Virginia over routes wholly within the State for movement beyond by barge to both interstate and intrastate destination. The interstate movements are already subject to the eastern intraterritorial increases for the identical rail transportation within West Virginia over respondents' lines. And finally, protestant failed to present evidence which indicates the extent that interstate traffic from West Virginia moves to southern territory. National's evidence concerning West Virginia coal shipments to southern territory does not indicate the volume of movement, whereas the respondents' evidence shows that in 1974 not more than 9.4 percent of the total West Virginia coal product moved over the C&O to southern territory and not more than 5.6 percent over the N&W. Concerning other commodities, here again National has described carload shipments of certain commodities such as chemicals being transported to the South, but there is no indication that the proportion exceeds the 9.4 percent of the C&O coal traffic destined to southern points.

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[6] Traffic Executive Association-Eastern Railroads, Agent, Tariff of Increased Rates and Charges X-267-B, I.C.C. C-859.

Protestant's rebuttal that Note 15 of master tariff X-267-B places certain West Virginia stations in southern territory does not convince us that increases other than levels corresponding to the eastern intraterritorial ex parte rate increase should apply. Normally, traffic moving between West Virginia and southern territory points in Kentucky and Virginia would be east-south interterritorial. However, in Note 15 of master tariff X-267-B, the railroads have placed some West Virginia stations along with the normally eastern territory points in Kentucky and Virginia in southern territory *solely* for the purpose of applying increases from and to the South. However, Note 15 does not affect the application of increases on movements between such eastern territorial points. Movements between those points remain eastern territorial points. Movements between those points remain eastern intraterritorial. The effect of Note 15 is that instead of east-south interterritorial increases applying on all traffic between West Virginia and the South as normally defined, southern intraterritorial increases may apply between Note 15 West Virginia points and points in the South unless otherwise provided. As a result of this situation, there can be three different levels of increases applying between West Virginia and the adjoining States of Kentucky and Virginia depending upon the points involved: (1) east intraterritorial, (2) east-south interterritorial, or (3) south intraterritorial. However, the point to be emphasized is that Note 15 does not change the basic fact that traffic moving from West Virginia to immediately adjacent points in the adjoining States of Kentucky and Virginia on the respondents lines is eastern intraterritorial traffic.

We also note that the Administrative Law Judge erroneously relied on the findings in *Arkansas Intrastate Frt. Rates and Charges—1972*, 349 I.C.C. 9 (1974). In that proceeding, certain protestants argued, as here, that the car-mile earnings from Arkansas intrastate rates on short-haul traffic compared favorably with earnings from certain long-haul interstate rates, namely, export rates. The Commission rejected this argument holding "there is no merit to protestant's comparison between car-mile earnings on short intrastate movements and on export traffic moving for much longer distances becauses, among other things, car-mile earnings are generally higher for shorter than longer distances."

Furthermore, in that proceeding the Commission found that there were pockets of interstate movements where the rates and charges had not been subjected to all of the authorized increases. Responding to such a situation, the Commission stated that if the interstate rates had been subjected to increases less than those authorized by this Commission, the increases applied to the Arkansas intrastate rates would be similarly restrained.

The Admininstrative Law Judge in the prior report in this proceeding took the above *Arkansas* language out of context and interpreted it to mean that where more than one interstate rate group may appear applicable, that the lower one shall apply. We disagree with such an interpretation. The Commission in *Arkansas, supra*, had already found that a specific rate territory was "like" the intrastate traffic, but because the railroads had implemented ex parte increases within that territory less than that authorized by the Commission in its ex parte proceeding, the Commission indicated that the intrastate rate increases should be similarly restrained. The *Arkansas* case is not contrary to findings we have made, but rather can be cited in support of them.

In conclusion, the West Virginia traffic that protestant is concerned with is coal traffic, which is the predominant traffic moved in West Virginia. The evidence of record indicates that the interstate coal traffic moving between points in West Virginia and points in the adjoining States of Kentucky and Virginia over the line of respondents for short-line distances is eastern intraterritorial. It is such traffic, and not traffic moving from and to more distant Kentucky and Virginia points in southern territory which is like West Virginia intrastate traffic. Protestant has failed to present any evidence that would warrant a different conclusion. Accordingly, we find that the increases sought by respondents on West Virginia rates and charges are proper and just and reasonable. However, while the increases sought by respondents are just and reasonable on this record, modification may be sought with regard to individual rates if it can be shown that lesser increases than 28.1 percent have been taken on eastern intraterritorial traffic under the authorization in Ex Parte Nos. 262, 265, and 267.

Commissioner Christian concurred in the result.

Commissioner O'Neal voted to reject the circulated report and order and would have affirmed the initial decision herein.

It is ordered, That this proceeding be discontinued.

No. 35897[1]

CONTINUOUS MOVEMENT OF CHEMICALS & PETROLEUM PRODUCTS IN BULK

Decided January 19, 1977

1. In docket No. 35897, tariff under investigation, dealing with transportation of liquid chemicals and petroleum products, under continuous movement provisions, found lawful. Respondents and other carriers publishing similar provisions, ordered to record shipments tendered for carrier coordination and shipments accommodated, and report to the Commission in 6 months.
2. In No. MC-130235, applicant found to be operating as a broker without authority. Public convenience and necessity found not to require such operation. Application denied, and cease and desist order entered.

Homer S. Carpenter and *Robert K. Maslin* for respondents in title proceeding.

J. Michael Farrell for applicant in the embraced proceeding.

Marshall Kragen and *Harry C. Ames, Jr.*, for respondents in title proceeding and protestant in the embraced proceeding.

Arthur F. Bronczyk and *John J. Charuhas* for Bureau of Enforcement, Interstate Commerce Commission.

Leonard E. Murphy, Richard E. Shaw, and *Robert D. Wilson* for protestants.

Leonard A. Jaskiewcz, Edward J. Kiley, Martin J. Leavitt, James R. Stiverson, and *Ronald C. Mesmith* for interveners.

Peter M. Nemkov, Kenneth R. Pepperney, and *Robert R. Tierman* for shippers.

REPORT AND ORDER OF THE COMMISSION

DIVISION 2, COMMISSIONERS HARDIN, O'NEAL, AND CHRISTIAN

BY THE DIVISION:

Exceptions to the initial decision of the Administrative Law Judge were filed jointly by respondents[2] and by intervener, Dow Chemical

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[1] Also embraces No. MC-130235, TranServ, Inc., Broker Application.

[2] Coastal Tank Lines, Inc. (Coastal), in No. 35897, and TranServ, Inc., (TranServ), applicant in No. MC-130235.

Company (Dow), supporting respondents. Replies were filed by protestant Matlack, Inc. (Matlack),[3] by protesting interveners, The Maxwell Co., and Michigan Transportation Company, and by the Commission's Bureau of Enforcement. Our conclusions differ from those recommended. Requested findings not specifically discussed in this report or reflected in our conclusions or findings have been considered and found not justified.

The lawfulness of Bulk Carrier Conference, Inc., Agent, Tariff 72E (tariff 72)[4] is under investigation in No. 35897. The investigation was instituted by the Commission's Suspension and Fourth Section Board on its own motion, September 6, 1973. The tariff applies to the bulk transportation of liquid chemicals and petroleum products under continuous movement provisions, between points in the continental United States and Canada.

In No. MC-130235, by application filed March 26, 1974, TranServ, of Akron, Ohio, seeks a license authorizing operation in interstate or foreign commerce as a broker of the transportation of chemicals and petroleum products, in bulk, in tank vehicles, between points in the United States (except Alaska and Hawaii). It proposes to arrange and coordinate the continuous movement of shipments of chemicals and petroleum products on behalf of shippers.

The findings of fact of the Administrative Law Judge are accurately stated and are adopted as our own. Only those facts required for a proper understanding of our reasons for modifying the conclusions and ultimate findings of the Administrative Law Judge will be restated.

The continuous movement concept was designed to reduce the inefficient one-way operations characteristic of the tank truck industry. Respondents anticipate that the tariff will increase the "loaded-mile" factor from slightly over 50 percent to approximately 80 percent.[5] The savings generated by this increased efficiency are reflected in a reduced scale of rates under tariff 72. The tariff specifies that two or more loads must be tendered to the carrier by a

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[3] Nominally a respondent in No. 35897 and protestant in No. MC-130235

[4] MF-I.C.C. No. 149 and Supplement 1 thereto (or amendment or reissues). Tariff 72 was published under special permission, waiving rules 4(2), 4(9), and 12 or Tariff Circular 20. Tariff 72G, a reissue, shows participating carriers as: Chemical Haulers, Inc., Chemical Leaman Tank Lines, Inc., Coastal Tank Lines, Inc., Fulsang's Motor Service, Inc., Harding Express Company, Matlack, Inc., P.B. Mutrie Motor Transportation, Inc., Refiners Transport & Terminal Corporation, Rogers Cartage Co., Southern Tank Lines, Inc., Blue Line Transfer Co., Inc., Highway Freight, Inc., and Stahly Cartage Co.

[5] Cost evidence was submitted by Coastal as set out in appendix A.

single consignor, as a single shipment transported by a single tractor-trailer unit. For example, if the first load moves away from the carrier's origin area, the second load moves in the direction of the origin area. In some cases, the movement consists of three or more separate segments and the unit moves in a circular pattern, returning eventually to the carrier's origin. In essence, the shippers are provided with an incentive to adjust the timing of their shipments so as to minimize empty backhauls. Proponents contend that the continuous movement concept could result in substantial cost savings, reduction in operating miles, and reduced fuel consumption and pollution.

TranServ was established by Coastal Industries, Inc., parent company of respondent Coastal, in July of 1972, to coordinate continuous movement shipments. After learning that the status under which it was operating was questioned,[6] TranServ filed the instant application for brokerage authority. Numerous shipper statements in support were filed.

TranServ arranges transportation for numerous shippers under the provisions of the continuous movement tariff. Applicant maintains (1) that its strict procedural safeguards preclude the possibility that it will favor any carrier in the assignment of loads; (2) that it is careful to arrange shipments on a first-come, first-served basis; and (3) that the principal shipper controls the choice of the participating carrier to which the freight will be tendered.

The broad definition of consignor in the tariff enables multiple shippers to tender shipments naming TranServ as consignor. This device allows the carrier to bill TranServ for the total movement while TranServ subsequently bills each shipper in the movement. TranServ informs the shipper of the proportional rates and charges which are due and supplies information, such as total and individual loaded and empty miles and accessorial charges, necessary for the shipper to determine the accuracy of its charges. This procedure is necessary because the shipper's charge is based on a formula which accounts for the loaded-mile factor of the entire movement, as each shipper is assessed a portion of the total charge based on its share of the loaded miles. Although TranServ has tendered shipments to several participating carriers, only Coastal has consistently accepted them. Applicant has indicated its desire to tender loads to all carriers participating in tariff 72, and to any other carrier that has an effective continuous movement tariff.

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[6] No. MC-102616 (Sub-No. 869), *Coastal Tank Lines, Inc., Ext.—Bulk Traffic*, see 119 M.C.C. 474, at 475, 1974. Division 1 noted the finding in the initial decision "that while an affiliate of applicant appears to be operating as either a freight forwarder or broker without appropriate authority, the evidence of record is not sufficient to reach a determination on this issue."

The numerous shippers[7] supporting tariff 72 maintain that no undue preference or advantage to any shipper, region, or description of traffic will result from this tariff.

Matlack, a bulk carrier which originally participated in tariff 72 but has now withdrawn, opposes the tariff as used in conjunction with Coastal's affiliated company, TranServ. It maintains that the use of this tariff by its competitor in conjunction with the unauthorized brokerage operation is detrimental to its operations. Nevertheless, Matlack believes that its own continuous movement tariff, MF I.C.C. No. 236 (tariff 236),[8] is valid and beneficial to shippers in terms of reduced rates, and to the carrier in terms of better equipment use. This tariff, for which special permission was granted, provides for coordination of movements by the carrier. Matlack, as noted in the Special Permission order, has agreed that our findings in the instant proceeding will be binding with respect to the lawfulness of tariff 236.

Several smaller carrier protestants object that they have lost traffic due to the adverse competitive effects of tariff 72. They contend that these rates unjustly discriminate against carriers who hold one-way authority, and that the tariff constitutes a destructive competitive practice in violation of the national transportation policy. These carriers also stress that TranServ is likely to prefer its affiliate, Coastal, in the assignment of movements.

The Bureau of Enforcement contends that the tariff is unduly complicated and susceptible to different interpretations, and it points to instances of misapplication of the tariff. It objects that charges cannot be ascertained until the movement is completed, and asserts that because the tariff as published lends itself to undue and unreasonable advantages to particular shippers, it is inconsistent with the public interest.

The Administrative Law Judge found that the operations of TranServ are those of a broker within the meaning of the act, but that the public convenience and necessity do not require this

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[7] A summary of supporting shippers evidence is set out in appendix B of the initial decision. These shippers include Monsanto Company, Standard Oil Company of Ohio, BP Oil, Inc., Boron Oil Company, Vistron Corporation, Proctor & Gamble Company, Jefferson Chemical Company, Inc., United States Steel Corporation, Amoco Oil Company, Mobil Oil Corporation, Nopco Division of Diamond Shamrock Chemical Company, Shell Oil Co., Union Carbide Corporation, General Tire & Rubber Company, Exxon Chemical CompanyU.S.A., PPG Industries, Inc., E.I. du Pont de Nemours & Company, Inc., and Dow Chemical Company.

[8] This tariff has subsequently been republished as MF I.C.C. No. 255.

operation. He found that the tariff could result in substantial savings for both carriers and shippers. The potential for unjust discrimination and unfair and destructive competitive practices was noted, but the Administrative Law Judge found that the record affords no basis for concluding that this tariff will be used to foster such practices. The Administrative Law Judge was concerned that the definition of "consignor" will allow parties such as TranServ to discriminate in selecting which shippers are to enjoy the lower rates accruing under the continuous movement tariff. Consequently, the tariff was found unlawful, without prejudice to republication of a tariff defining the consignor as a shipper with a "bona fide interest in each movement (or in one of the segments thereof) and who would assume primary responsibility for the entire movement."

Coastal and TranServ (respondents) except to the following findings of the Administrative Law Judge: (1) that TranServ has been operating as a broker; (2) that tariff loads may be paired without the use of a broker or other consolidator; (3) that common control precludes the issuance of a brokerage license; and (4) that tariff 72 is unlawful unless amended as directed by the initial decision. Respondents stress that the tariff is necessary where the separate components of a single continuous movement are transported for the account of unrelated shippers. They argue that smaller shippers cannot use the carrier services under tariff 72 except through the medium of a third party and that requiring revision of the tariff to prevent the interposition of a third party would be contrary to existing common carrier law, as the courts and the Commission have always recognized the right of a freight forwarder, freight consolidator, or shipper's agent to demand transportation services from a common carrier in its own name. Respondents cite *I.C.C.* v. *Delaware, L & N. R. Co.*, 220 U.S. 235 (1911), *Container Service*, 173 I.C.C. 377 (1931), and numerous Commission proceedings where shipper associations have been investigated. Respondents take the position that an organization similar to TranServ but owned and operated by the shippers or by some independent interest would be lawful. They further allege that amendment of the tariff as required by the initial decision would lead to discrimination, preference, and prejudice among shippers because only large shippers would be able to use the tariff.

Dow excepts to the following findings of the Administrative Law Judge: (1) that tariff 72 has not been shown to be lawful; (2) that tariff 72 is not in the public interest or consistent with the national transportation policy; (3) that TranServ is operating as a broker without authority; and (4) that public convenience and necessity do not require the operation of TranServ. Dow contends that the issues of tariff 72 and TranServ have been unjustifiably intertwined, and that TranServ is not a *sine qua non* for the use of the tariff. Dow points out that there have been no complaints of discriminatory practices since the tariff was published in 1972, and that there is no evidence that TranServ has been operating in a discriminatory manner. In addition, Dow asserts that there have been no complaints of ambiguity or misapplication from the shipping public. Dow maintains that because TranServ contracts with shippers, not carriers, it is not a broker under sections 203(a)(18) and 211(a) of the act. It also believes that because the Commission's credit rules apply to the shipper-carrier transaction, they would not apply to TranServ.

Matlack contends that TranServ was properly identified as a broker, and should not be classified as a mere shippers' agent. It notes that supporting shippers have indicated, contrary to respondents' assertions, that TranServ chooses the carrier. Matlack alleges that no need has been demonstrated for this brokerage service and that a grant would be contrary to the public interest because TranServ will use its position to funnel traffic to its affiliate. It also argues that Coastal will favor its regular customers over other shippers, that the tariff definition of consignor is improper, and that the tariff is unlawful because shippers cannot determine rates in advance.

Matlack states that the issue tariff is not the only possible way to make the benefits of the continuous movement concept available to all, and that its own tariff[9] is a better alternative. Matlack notes that its tariff, under which the carrier arranges and coordinates the loads, was published only for competitive reasons. If necessary, Matlack would limit the tariff to shipments tendered by a single shipper to preclude the possibility of discrimination. Finally, Matlack asks that the division affirm the report and order of the Administrative Law Judge in its entirety.

Michigan Transportation Co., and Maxwell,[10] reiterate their position that the tariff is an unfair competitive practice, because carriers with one-way authority cannot participate.

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[9] Bulk Carrier Conference Tariff MF-I.C.C. 236 (tariff 236), which has subsequently been republished as Bulk Carrier Conference Tariff MF-I.C.C. 255, for which special permission was granted in Special Permission Application No. 76-8, waiving tariff circular rules 4(a) and 4(g).

[10] Motor common carriers of liquid bulk commodities.

The Bureau of Enforcement argues that the tariff should not be found lawful "merely because it suits the convenience of certain shippers," and contends that many of the substantive aspects of the tariff are inherently ambiguous.

Finally, other parties have filed continuous tariffs with similar provisions, and have received special permission to file these tariffs. These parties, in their special permission applications, have agreed to be bound by our finding in the instant proceeding:

Tariffs directly affected by docket No. 35897

Tariff	Current MF-ICC number	Special Permission No.
Bulk Carrier Conference, Inc. 72-E[1]	263	74-110-M
Bulk Carrier Conference, Inc. 236[2]	288	75-3790-M
D & L Transports, Inc. No. 800[2]	14	76-2156-M
Robertson Tank Lines, Inc. No. 4[2]	103	76-4200-M
International Detective Service, Inc.[3]	39	77-1435-M

[1] Under investigation in docket No. 35897.

[2] The special permission orders authorizing these tariffs stipulate that the applicant has gone on record as willing to abide by the Commission's findings in docket No. 35897.

[3] To become effective December 5, 1976.

Discussion and Conclusions

The Commission encourages efforts of the motor carrier industry to offer innovative services to increase efficiency in the transportation of liquid bulk commodities, and the continuous movement concepts shows a significant promise of alleviating the empty backhaul problem characteristic of that industry. Possible benefits include elimination of the need for private carriage, reduced rates, reduced carrier costs, fuel savings, a decrease in polluting emissions, and decreased highway congestion. Nevertheless, the specific continuous movement tariff under investigation here, as implemented by the intermediary TranServ, creates opportunities for discrimination, preference, and prejudice which must be addressed and remedied.

The Continuous Movement Tariff

A basic problem of the continuous movement tariff is that some party must be responsible for coordinating the movements. The simplest situation occurs where a single shipper coordinates its own movements. The shipper tenders several shipments simultaneously on a single bill of lading, directly to the carrier, and the carrier is then obligated to perform the service set forth in its tariff, at the lower continuous movement rate. The record indicates that this type of movement accounts for a preponderence of the traffic moving under these tariffs. Generally, only large shippers with extensive operations are able to coordinate the continuous movement shipments themselves.

Application of tariff 72 becomes more complicated where more than one shipper is involved in a single continuous movement. The requirement that shipments be tendered by a single shipper, at one time, on a single bill of lading has been accomplished by the fiction of naming TranServ as the consignor.[11] Coastal has used this fiction as a means of extending the benefits of the tariff to a greater range of shippers, while Matlack has achieved a similar result by performing the coordination service itself. In these situations, shippers tender freight to TranServ or Matlack for possible inclusion in a movement, because they do not know in advance whether or not the shipment will move under the lower continuous rates or under the otherwise applicable rates. Further, shippers do not know what other shipments their shipment will be paired with, and even after the movement is arranged and begun, subsequent shippers who were scheduled to be included in the movement have the option of canceling their participation. Although the shipper knows the applicable rates, it does not know the exact transportation charges until it is billed by the broker or the carrier.

Coordination of these movements by a broker or a carrier gives that party a great deal of discretion, because not all shippers who tender freight can be accommodated, and the choice of which shipper is to be included will result in a significant difference in the rates to be charged. The Administrative Law Judge's observations in this regard bear repeating here:

> It is apparent that there is a potential for unjust discrimination and unfair and destructive competitive practices under Tariff 72. However, the record affords no basis for concluding that this tariff will be used to foster such predatory practices. On the contrary, the underlying purpose of the proposal is entirely in keeping with the goals of Congress as set out in the national transportation policy, that is, to promote safe, adequate, economical and efficient service and foster sound economic conditions

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[11] However, the record indicates that in practice the name of the actual shipper has often appeared as the consignor.

in transportation. Should unlawful practices occur, aggrieved parties have an adequate remedy by complaint.

We believe that the Administrative Law Judge's assessment of this situation is essentially correct. No aggrieved shippers have appeared here; to the contrary, numerous shippers have filed statements in support of tariff 72 and of the continuous movement concept in general. Important to our consideration here is the fact that although tariff 72 has been in effect since 1973, and tariff 236 has been in effect since April of 1976, the Commission has not, to our knowledge, received a single complaint, either formal or informal, concerning these tariffs. In these circumstances, we do not believe that mere general allegations and possibilities of discrimination to shippers raised by competing carriers are in and of themselves sufficient to sustain a finding of unjust discrimination. See *Aggregate Rates from Rochester, N. Y.*, 325 I.C.C. 474, 481; *Freight, All Kinds, Chicago and Ind., Mich., Ohio*, 322 I.C.C. 423, 427 (1964); and *Proportional Rates Between Harrisburg & Points in Pa.*, 315 I.C.C. 499, 503 (1962).

We must reject the argument that the tariff is a destructive competitive practice contrary to the national transportation policy because it will divert traffic from carriers holding one-way authority. Proposals to reduce rates have often been approved in the face of competitor protests when, as here, the public would benefit and the proposal was not in contravention of any section of the act. No party here has questioned the compensativeness of the rates under investigation, and operations under the continuous movement tariff have accounted for substantial reductions in costs which justify a difference in rate treatment. Further, protestants have not shown that the tariff will result in the diversion of any of their traffic. In fact, it appears that very lucrative traffic will be diverted from private carriage to regulated carriers thus enhancing the latter's revenues without damage to other regulated carriers.

Moreover, it appears that the coordination of shipments by either the carrier or a third party, a device for allowing several shippers to participate in a single continuous movement, allows moderate-sized shippers who would otherwise be unable to participate to enjoy the lower rates offered in these tariffs.

We believe that it is appropriate to allow the carriers the ratemaking flexibility necessary to implement this innovative and somewhat experimental tariff. At this point it appears that the potential for discrimination created by the tariff is theoretical only, and that publication of the tariff would be in the public interest. Nevertheless, given the experimental nature of the tariff, we believe that carriers offering this service should keep records of shipments tendered for coordination and possible inclusion under a continuous movement tariff. The carriers, in addition to maintaining "accurate records showing actual route of movement for each continuous movement shipment" as required by the special permission orders, should indicate what shipper requests for inclusion have been made and which requests have been accommodated. Their information should be submitted to the Commission and a copy served on parties to this proceeding within 6 months from the date of service. Following receipt of these reports and after allowing a 30-day comment period, the Commission will review the reports and any comments received, and determine whether this proceeding should be reopened for possible modification or cancellation of these tariffs.

The fact that charges cannot be ascertained before the shipment is made does not preclude a finding of lawfulness under section 217 of the act. The situation here is similar to that faced by the Commission in *Weekly Rates on Petroleum Products—from Sparks, Nev.*, 322 I.C.C. 541 (1964). In approving rates which fluctuated with weekly volume, the Commission said that there is substantial compliance with section 17 of the act "where the carriers file schedules which are open to public inspection showing all rates, fares, and charges for transportation which they are authorized to perform." See also *Grain by Rent-A-Train IFA Territory to Gulf Ports*, 339 I.C.C. 579 (1971), and *Reduced Seasonal Household Goods Rates*, 335 I.C.C. 761.

Finally, although International Detective Services, Inc., which transports gold bullion, has agreed to be bound by our findings herein, the record does not contain sufficient evidence on which to base any findings with regard to its tariff. Accordingly, our findings will be limited to carriers transporting liquid bulk commodities.

THE BROKERAGE APPLICATION

The service which has been performed by TranServ here is that of a broker within the meaning of section 203(a)(18) of the act. Applicant holds itself out to serve the general public arranging for transportation of certain bulk tank truck loads with any carrier that is a party to tariff 72 or other similar tariffs. Further, the

Administrative Law Judge correctly found that TranServ is a broker and not a shippers' agent, because the operations of TranServ cannot be identified with any particular shipper or group of shippers, but should rather be identified with the affiliated carrier, Coastal.[12] The relationship between applicant and the shipper is a short-term one based solely on the arrangement of transportation. See *Tauck Tours, Inc., Extension—New York, N. Y.*, 54 M.C.C. 291, 299 (1952), and *Movers Conference of America—Declaratory Order*, 82 M.C.C. 437 (1960). Consequently, TranServ performs a service for which a permit is required under section 211 of the act.

To support an application for brokerage authority under section 211(b) of the act, an applicant must demonstrate that it is fit, willing, and able properly to perform the service proposed and that the proposed service will be consistent with the public interest and the national transportation policy. Applicant has not demonstrated that the proposed service is in the public interest. The principle problem is the common control of applicant and Coastal, the carrier which provides most, if not all, of the transportation services arranged by TranServ.

Although the Commission has not created an absolute prohibition against common control of brokers and motor carriers, it has recognized the strong possibility for discrimination where the broker is affiliated with a motor carrier which it might use to provide the transportation service sought.[13] In *Knowles Storage and Moving Co. Broker Application,* 48 M.C.C. 386 (1948), the Commission denied a brokerage application because applicant and a motor common carrier were under common control, and the Commission's reasoning in that case applies with equal force here:

> Applicant admittedly would favor its subsidiary by tendering it shipments whenever possible and thus destroy the free exercise of discretion which should be that of a broker in making the most favorable arrangements for the general public.

At this point, there is only one carrier participating in the tariff, and, therefore, applicant would not be able to arrange any service other than that of Coastal. Although applicant has indicated a willingness to tender freight to any carrier who has a continuous movement tariff, other carriers have shown extreme reluctance to deal with TranServ because of its affiliation with a competing carrier. In any event, TranServ does not have the requisite free exercise of discretion to choose motor carrier services which are the most favorable for shippers. Accordingly, the application will be denied.

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[12] For a thorough explanation of this issue, see the initial decision, pp. 15-16.

[13] See the Notice of Proposed Rulemaking in Ex Parte No. MC-73, *Passenger Brokers Affiliated with Motor Carriers*, 120 M.C.C. 656.

As previously noted, the Administrative Law Judge was concerned that the broad definition of consignor will encourage the use of parties such as TranServ on a possibly discriminatory basis. However, we believe that the third party device need not create opportunities for discrimination and that the definition of consignee can properly be varied by the tariff. A neutral broker which complies with the requirements of section 211 of the act would be proper. Likewise, a shippers' association which is in conformity with section 402(c)(1) of the act would also be appropriate. Therefore, the initial decision to the extent that it would prohibit use of a lawful brokerage or shippers' organization in connection with these tariffs is hereby overruled.

It is ordered, That the application in No. MC-130235 be, and it is hereby, denied, and applicant is ordered to cease and desist from this operation.

It is further ordered, That Coastal and Matlack shall record and report continuous movement shipments tendered for coordination by the carrier as specified in the report herein.

It is further ordered, That D & L Transports, Inc., and Robertson Tank Lines, Inc., shall also record and report as specified in the preceding paragraph.

And it is further ordered, That this proceeding be, and it is hereby, discontinued.

APPENDIX A

Coastal Tank Lines, Inc. revenue and direct cost tariff 72 compared with one-way rates (summary of selected shipments transported during period January 1, 1974-July 31, 1974)

	Tariff 72		One-way rates	
	Amount	Percent of revenue	Amount	Percent of revenue
Revenue:				
Freight revenue	$13,527		$20,967	
Detention revenue	1,225		688	
Accessorial revenue	182		182	
Total	14,934	100.00	21,837	100.00
Miles	14,788		25,688	
Expenses				
Maintenance cost (mileage)	2,309		3,992	
Cleaning cost (shipment)	690		690	
Total	2,999	20.08	4,682	21.44
Transportation cost				
Drivers wages (mileage)	2,638		4,586	
Fuel cost (mileage)	1,210		2,102	
Other transportation cost (mileage)	730		1,263	
Loading and unloading time	941		941	
Drivers time cleaning	222		-0-	
Other transportation cost (shipment)	650		1,390	
Total	6,391	42.79	10,282	47.09
Terminal cost (shipment)	202	1.35	440	2.01
Fuel taxes (mileage)	351		611	
Depreciation (mileage)	995		1,729	
Total direct expenses	10,938	73.24	17,744	81.26
Revenue above direct expense	3,996	26.76	4,093	18.74
Total miles	14,788			
Loaded miles	12,978			
Percent loaded miles	87.76			

INVESTIGATION AND SUSPENSION DOCKET NO. M-29115

MOTOR CLASSIFICATION RATINGS ON CANDY OR CONFECTIONERY

Decided January 17, 1977

Proposed changes in classification ratings on candy or confectionery found just and reasonable. Proceeding discontinued.

Bryce Rea, Jr., and *John R. Bagileo* for respondents.
Edward H. Hummers, Jr., and *David G. Rozzelle* for protestants.

REPORT AND ORDER OF THE COMMISSION

DIVISION 2, COMMISSIONERS HARDIN, O'NEAL, AND CHRISTIAN

O'NEAL, *Commissioner*:

By schedules filed to become effective July 19, 1976, the National Motor Freight Traffic Association, Inc., Agent, on behalf of member carrier participants in the National Motor Freight Classification (NMFC), proposed certain changes in the class 85 AQ (any quantity) rating presently applicable to hollow mold chocolate and confectionery under item 39960. Briefly, the considered proposal seeks to separate hollow mold candy into three categories and provide less-than-truckload (LTL) and truckload ratings and minimum weights on the commodities based upon their transportation characteristics.

Following protest, the Suspension Board voted against suspension of the schedules. The National Confectioners Association of the United States, Inc. (NCA), appealed the Suspension Board's ruling. The Commission, Division 2, by order served July 16, 1976, suspended the proposals to February 18, 1977, and ordered an investigation into the lawfulness thereof.

On July 23, 1976, the National Classification Committee (respondent), petitioned to vacate the order of suspension, to which the NCA replied on August 12, 1976, and the Commission denied the petition to vacate the suspension by order served August 26, 1976. By order served August 13, 1976, the matter was set for oral hearing in Washington, D.C., before Administrative Law Judge J. F. Walker and the hearing was held September 21 and 22, 1976. Posthearing briefs have been timely filed by the parties.

All orders and rulings made at the commencement of the hearing in connection with a motion to dismiss, motion for pretrial conference, cross-motions to compel answers to interrogatories, and motion for production of documents, including rulings made during the course of the oral hearing are affirmed. Requested findings not discussed in this report nor reflected in the findings or conclusions have been considered and found not justified or not material to the disposition of this proceeding.

Due and timely execution of our functions under section 216(g) of the Interstate Commerce Act mandate the omission of an initial decision in this proceeding.

Item No	Description	LTL	Truckload	Minimum weight factor
	The present tariff classification			
39960	CANDY GROUP, subject to Item 39900, Candy or Confectionery, hollow mold, chocolate or other than chocolate in boxes	85	85	AQ
	Proposed tariff classification			
39960	CANDY GROUP, subject to Item 39900, Candy or Confectionery, hollow mold, chocolate or other than chocolate, in boxes			
Sub 1	Eggs, foil-wrapped, other than individually packaged in inner containers	85	50	24.2
Sub 2	Eggs or Other Forms or Shapes, molded sugar	85	50	24.2
Sub 3	NOI	125	100	12.2

Subs 1 and 2 propose to maintain the present LTL rating of class 85, establish truckload ratings of class 50 and establish the minimum weight factor (MWF) of 24.2 for foil-wrapped eggs, other than individually packaged, and for hollow-molded sugar confectionery. The remainder of hollow mold confectionery is proposed to be embraced by Sub 3 which increases the LTL rating by 47 percent to class 125, increases the truckload rating by 18 percent to class 100, and fixes the MWF of 12.2 (exhibit 4, pp. 1-2).

RESPONDENT'S EVIDENCE

The National Motor Freight Classifications are applicable on a nationwide basis and govern the tariffs of approximately 5,000 participating motor common carriers. Under the section 5a agreement approved by the Commission, the day-to-day function of maintaining and making appropriate changes in the National Motor Freight Classification (NMFC) is assigned to the National Classification Board (NCB). The NCB is a body of classification experts appointed by the National Classification Committee (NCC). The NCC is composed of 100 elected carrier representatives whose duty is to prescribe provisions of the NMFC. The decisions of the NCB may be proposed by a shipper, a carrier, or by the NCB. In the instant case, the proposal to change the present tariff classification was initiated by the NCB.

Reportedly, the proposed item 39960, if approved by the Commission, will affect hollow mold candy shipments, both chocolate and molded sugar, handled by the motor common carriers throughout the United States who are parties to the NMFC.

The chairman of the NCB asserted that so far as the considered commodities are involved, the relevant transportation characteristics include (1) density, i.e., shipping weight per cubic foot (hereinafter referred to as PCF); (2) value per pound; (3) perishability; (4) susceptibility to damage; (5) care and attention necessary in loading and transporting; and, (6) stowability. The witness states: "After evaluation of all the pertinent transportation characteristics, the density characteristics of hollow mold candy was given primary consideration in formulating the classification provisions published in proposed Item 39960-A" (exhibit 5, p. 6).

The NCB analyzed over 3,000 bills of ladings covering hollow mold candy shipments handled by 22 motor carriers on behalf of four large candy shippers. The bills of ladings indicated the names of the shippers; the carriers handling the hollow mold; and, that the traffic moves primarily from origins in Pennsylvania to points generally throughout the United States. The review and study of the bills of lading also disclosed that of the total number of shipments of hollow mold, 87 percent were mixed shipments of hollow and solid confectionery and that 13 percent consisted of straight shipments of hollow mold (Tr. 221, 278-279). Additionally, the NCB conducted a platform study involving examination of 2,407 individual cartons, of which 2,311 cartons consisted of types of hollow mold candy and 96 cartons were foil-wrapped eggs.

In connection with the described transportation characteristics which respondent considered controlling so far as the instant commodities are concerned, the following summarizes generally the evidence presented supporting each characteristic upon which respondent relies for its proposed change in classifications, namely:

DENSITY

Reportedly the only known manufacturer of hollow molded sugar confectionery described in proposed Sub 2 of item 39960 is Joffe Candy Co., Inc., of Mount Vernon, N.Y., and the density figures for these commodities were obtained from such source by letter and telephone inquiry. (Tr. 75) On the other hand, the density figures for hollow mold chocolate as described in Subs 1 and 3 of the proposed change in item No. 39960 were obtained through a platform study conducted by the NCB's research section. This study included a survey which was intended to embrace the products of all known manufacturers of hollow mold confectionery and it consumed approximately 70 man-days of effort. Since confectionery representatives had previously indicated in other proceedings before the Commission that the bulk of hollow mold candy was shipped during the period commencing shortly prior to Christmas and continuing to Easter, the platform study was conducted on specified days during January and February 1975 and 1976. Inspections were made of the hollow mold chocolate produced by various named manufacturers who, collectively, were alleged to produce 95 percent of the hollow mold confections in the United States. These included Berkshire Candy Co., Reading, Pa.; Bortz Chocolate Novelties, Reading, Pa.; Frankford Candy & Chocolate Co., Philadephia, Pa.; Luden's Inc., Reading, Pa.; R. M. Palmer, Co., Reading, Pa.; and, Zachary Confections Inc., Chicago, Ill. Uniform procedures for weighing and measuring were followed by the teams conducting the surveys at the various carrier terminals. The *modus operandi* pursued in the survey may be generally described as follows:

Inspections were conducted by two or more persons, one who reported the data and the other(s) to weigh, measure, and handle the cartons. All packages were opened whose contents could not be unquestionably identified as hollow mold by the information appearing on the package and the accompanying bill of lading. Each hollow mold shipment was inspected carton by carton, with each carton being weighed and measured individually and all data being recorded along with the information from the shipping papers. The cartons which were opened were examined to ascertain the model number and model name of the carton contents, and the number of retail packages in the carton. At least one carton of each different model was opened to determine the exact contents. The information obtained was recorded on data sheets designed for such purpose. In weighing the cartons, certified scales were employed in each instance.

After assembling the raw data the same was analyzed and density computed according to the following formula:

Length x[1] *x width*[1] *x height*[1]—volume (cu. ft.)
Weight (lbs.)
Volume (cu. ft.)—density (lbs./cu. ft.)

In measuring the cartons, flexible steel measures were used and the measurements were taken on the sides rather than on the tops and bottoms of the cartons in order to insure greater accuracy.

A total of 2,407 cartons were weighed and measured in the course of the survey (exhibit 1, p. 6), and it was estimated that about 10 percent of the cartons weighed and measured were opened for inspection purposes (Tr. 101-102).

The attached appendix A reflects a density range of from 2.52 to 13.20 PCF, based upon examination of 2,407 cartons; appendix A also shows the density relationship for hollow mold chocolate shipped by each of the suppliers and indicates an average density of 6.0 PCF among all of the hollow mold manufacturers (exhibit 1, p. 7).

Nearly 200 models of hollow mold chocolate were included in the 2,407 cartons observed (exhibit 1, p. 8). Counting the average density of each model once, the mean average density of all models was 6.40 PCF.

The attached appendix B indicates that the average densities of the *models*, by company (6.07 PCF), closely approximated the company average densities shown by *carton* (6.0 PCF).

The attached appendix C shows 5.82 PCF as the overall company average density for hollow mold chocolate, exclusive of foil-wrapped eggs.

Testimony was submitted to show that the density range for hollow mold chocolate was appreciably greater than for the foil-wrapped eggs (exibit 1, p. 9). In support thereof, the following analysis was received in evidence (exhibit 1, p. 10):

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[1] In inches.

	Number cartons examined	Average density (PCF)	Density range (PCF)
Foil-wrapped eggs	96	11.96	7.82-13.20
Other hollow mold	2,311	6.15	2.52-12.86

The foregoing table in exhibit 1, although differing slightly, compares favorably with the average densities set forth on exhibit 5, p. 5 which points to an average density of 11.85 PCF for eggs, foil-wrapped; 11.50 PCF for molded sugar forms or shapes; and 6.24 PCF for hollow mold chocolate (NOI). Reportedly, the median density of the 2,311 observations of hollow mold chocolate, other than foil-wrapped eggs, was 5.89 PCF (exhibit 2, p. 4); that 73.7 percent of the hollow mold chocolate, other than foil-wrapped eggs, had densities within a range of 4.0 to 7.0 PCF, and 80 percent had densities below 7.0 PCF (exhibit 2, p. 5).

Based upon the described survey of shipments, together with the information obtained from Joffe Candy Co., the following density profile for hollow mold candy was submitted (exhibit 5, p. 5):

	Average density (PCF)	Density range (PCF)
Eggs, foil-wrapped, other than individually packaged	11.85	7.82-13.20
Eggs or Other Forms or shapes, molded sugar	11.50	10.00-13.00
NOI	6.24	2.52-12.86

Respondent asserts LTL class 85 is a rating closely tied to density and normally approximating 12 lbs. PCF; that when articles within such average density are also associated with other transportation characteristics rendering their transportation more difficult they require a higher LTL rating. Respondent introduced testimony that the transportation characteristics applicable to class 85, were an average density of 12 PCF, a value of not greater than about $2 per pound, packaging sufficient to protect the commodity from normal hazards incident to transportation, and, a low claims ratio (Tr. 146-147). Respondent also argues that LTL class 125 is likewise a density-related rating, and is normally applicable to commodities having an average density of 6 to 7 PCF. Where other transportation characteristics render the transportation of commodities in this density range more difficult, an LTL rating higher than class 125 is considered appropriate.

In the following table respondent compares its proposed change in class ratings with average densities and value characteristics of other commodities which have been considered to warrant an LTL class 85 rating, namely:

Item	Description	Average density (PCF)	Average value (cents/lb.)
21225	Stuffing, herb seasoned	11.11	$0.38
40025	Figures or Images, marshmallow	13.8	
42370	Chips or Sticks		
72750	Dessert Mixes	19.5	
74445	Potatoes, cooked and powdered	12.07	$ .78
74455	Potatoes, cooked and flaked	18.32	
74460	Potatoes, shoestring	12.1	$ .34

Under Sub 2 of item 38860 respondent proposes to apply an LTL rating of class 85, and truckload rating of class 50, with a truckload minimum weight of 24,000 pounds on Eggs or Other Forms or Shapes, molded sugar. As stated, a single known manufacturer, Joffe Candy Co., Inc., produces products within this description, the average density of which is asserted to be 11.50 PCF, with an average value of $1.61 per pound (exhibit 5, p. 5). Respondent reported this shipper's experience with breakage claims amounted to less than .05 percent. Since the density of this commodity compares closely with the 11.85 PCF density found to apply for foil-wrapped chocolate eggs, the NCB contends the LTL class 85 is warranted.

Respondent states that a carrier trailer may be loaded with about 28,000 pounds of products of this character. Therefore, as with the foil-wrapped eggs, a truckload minimum weight combination of 24,000 pounds is considered a truckload minimum that these articles can reasonably meet and compares favorably with truckload ratings applicable to articles exhibiting similar loadability characteristics (exhibit 5, p. 8-9).

Respondent points out that the truckload rating of class 50 proposed is actually a reduction of rating because under the present "Any Quantity" of item 39960, class 85 applies irrespective of the weight of the shipment tendered.

The proposed item 39960, Sub 3, seeks to apply an LTL rating of class 125 and a truckload rating of class 100, with a truckload minimum weight of 12,000 pounds, on hollow mold chocolate, other than foil-wrapped eggs, NOI, in inner packages. Respondent asserts the LTL class 125 is normally applied on commodities with an average density approximating 6 or 7 PCF.

In the attached appendix D respondent compares the proposed change in class ratings under Sub 3 with other commodities which carry a rating of LTL class 125, some of which ratings were established in the course of proceedings before the Commission (exhibit 5, attachment B).

The NCB argues that with an average density by carton of 6.15 PCF, and by model of 6.24 PCF, and an average value of $1.70 per pound, hollow mold chocolate, other than foil-wrapped eggs, on the basis of density alone, was considered well within the ambit of commodities normally assigned LTL class 125 (exhibit 5, p. 7).

It is seen that the NCB seeks to decrease the truckload minimum weight to be applied on these articles from the 15,000 pounds which may be loaded upon the vehicle to 12,000 pounds, for the purpose of encouraging the shippers to tender larger shipments. In support thereof respondent argues that with an average density by model of 6.24 PCF, a carrier's trailer having a carrying capacity of 2,470 cubic feet could be loaded with about 15,000 pounds of hollow mold chocolate, other than foil-wrapped eggs (exhibit 5, pp. 8-9). The review of over 3,000 bills of ladings submitted by the carriers with respect to hollow mold candy indicated about 13 percent involved straight shipments of hollow mold candy and 87 percent consisted of mixed loads of hollow mold and solid confectionery (Tr. 221, 278-279). More than 90 percent of those shipments moved in LTL quantities (exhibit 5, p. 8).

VALUE OF THE COMMODITY

Based upon NCB's investigation, the value of hollow mold chocolate approximates $1.70 per pound. The average value per pound of molded sugar forms or shapes amounts to $1.61 per pound, according to information obtained from the only known manufacturer of products falling within such description. Respondent's witness stated that the foregoing levels of value are considered neither high nor low for either class 85 or class 125 rating (Tr. 269-70).

PERISHABILITY

Respondent seeks to demonstrate the inherent perishability of hollow mold chocolate by citing shippers' notations upon bills of lading bearing such lanaguage as follows:

> "Chocolates Perishable"; "Protect from Sun"; "Keep Cool Do Not Leave in Sun"; "Protect from Heat"; and, "Important Notice—Maintain Temperature between 65° - 70° at All Times" (Exhibit 5, p. 5; Tr. 219).

The testimony indicated that similar notations, in some instances, appeared on the carriers' own freight bills. In this same regard the respondent asserts that the confections must be protected from outside trailer temperatures as well as from temperatures inside the trailer when cargo heaters are employed for the protection of other commodities. It is also alleged that a need exists to protect the commodities from heat with respect to placement of the cartons on the terminal dock during loading and unloading.

Respondent further refers to a characteristic of the commodity which it describes as "market perishability." Since the movement of the traffic is seasonal, a carrier is required to strictly observe specified delivery dates because of the greatly diminished value to the retailer in the event of late deliveries, particularly after the Easter season. In support of this factor respondent points to shipper notations on bills of ladings such as "Rush Delivery".

CARE AND ATTENTION NECESSARY IN LOADING/TRANSPORTING

In connection with the quality of fragility of hollow mold candy, reference is again made to shipper notations on cartons such as "Fragile Handle With Care"; and, marking the cartons with arrows to indicate proper loading direction. Moreover, the testimony indicates the practice of some shippers to provide breakage allowances to customers.

STOWABILITY

This factor is related to the characteristic discussed in the preceding paragraph to the extent that special care is required in handling the commodities. It is further argued that the breakable nature of the products precludes top loading of heavy freight, and that there exists a necessity of keeping the candy cartons a safe distance from any cargo heaters inside the trailers which may be utilized to protect other cargo from cold temperatures.

SUSCEPTIBILITY TO DAMAGE

With respect to this factor, involving the likelihood of damage in loading, in transit, and unloading, respondent recognizes a generally low ratio of damage claims filed by shippers or consignees against the transporting carriers. It argues, however, that the number of claims filed does not accurately dispose of the question of susceptibility of the articles to damage since, although claims may be minimal, such fact does not diminish the fragile nature of the products *per se*. This argument appears to be that despite the carriers not being required to pay damage claims the fact remains that the confections are still subject by their nature to breakage and damage. Reportedly, one carrier (Ringsby System) indicated shippers were very cooperative as to claims and simply accepted carrier declinations, requesting only a return of the candy; another carrier (Motor Freight Express) acknowledged receipt of a large number of claims but the same were declined on the basis of concealed damage which was apparently acceptable to shippers; another carrier (Consolidated Freightways) reportedly paid a number of claims in 1969 but indicated a marked decrease in claims thereafter.

Respondent further argues that irrespective of the present apparent minimal claims against carriers for breakage/damage, should the shippers change their claims practices, the matter of claims might well constitute an unfavorable transportation characteristic.

Respondent points to the well-established principle that the classification rating should provide the highest level which is just and reasonable, and that exceptions higher than the classification are an anomaly which should not exist. Therefore, it is contended that the existing classification be changed as herein proposed in order to provide classification reflecting the light density of certain hollow mold products as those carriers which are disadvantaged by the continued application of the subnormal class (for the density involved) have no recourse. On the other hand, respondent adds that those carriers which because of traffic mix, backhaul, or any other consideration desire to maintain a lower level of class ratings for hollow mold may readily do so by publishing appropriate exceptions to the classification.

On brief, respondents acknowledge the burden of proof as proponents of the proposed change in classification, and accept the proposition shippers bear no obligation to provide data to the NCB regarding the shippers' products.

Respondents contend, however, that while a shipper's passive refusal to provide data affecting its products may be tolerated, it is improper for a shipper to actively interfere with the carrier's statutory duty under section 216(b), or to engage in conduct designed to prevent material data being presented in a proceeding before the Commission. In this respect, the NCB asserts the traffic manager of one of the shippers should be admonished for issuing a letter (exhibit 6) urging a carrier not to supply certain information requested by the NCB concerning the nature of the shippers' products.

PROTESTANTS' EVIDENCE

The National Confectioners Association (NCA), although represented at the hearing, presented no direct evidence of its own and takes the position that the respondents have failed to sustain their statutory burden under section 216(g) of the act in proving the proposed tariff changes to be just and reasonable.

The only direct evidence in opposition was presented on behalf of Burgmeyer Bros., Inc. (Burgmeyer), a motor common carrier, holding regular- and irregular-route authority under No. MC-29684, and various subnumbered certificates, and who is a participant in the National Motor Freight Traffic Association. Burgmeyer has been and is engaged in the handling of hollow mold chocolate for such shippers as Luden's, Inc., Bortz Chocolate Company, R. M. Palmer Company, and Berkshire Candy Company (Tr. 112). Burgmeyer supports the continued application of the present LTL class 85 rating, and alleges the transportation characteristics of the commodities support the present class rating. Burgmeyer does interline shipments with other carriers, but does not participate in any tariffs covering the movement of hollow mold candy into the South or to the West (Tr. 140). The witness was unable to state whether Burgmeyer handles candy on an interline basis (Tr. 139-140). On cross-examination, the witness stated that the average length of haul performed by Burgmeyer was 200 miles (Tr. 134). In handling a shipment from Reading, Pa., to Miami, Fla., the witness indicated it would originate the shipment and thence interline with another carrier at a point 200 miles from Reading for ultimate delivery.

Concededly, Burgmeyer made no specific density study affecting the considered commodities, and the witness stated he did not consider the density factor of hollow mold chocolate "decisionally significant" (exhibit 4, p. 3) inasmuch as other factors relevant to the transportation characteristics of the commodities weighed heavily in favor of the existing class 85 LTL rating. In this regard the witness alleged (exhibit 4, p. 2):

> 1. Hollow mold is not susceptible to theft and the carrier experienced no claims account theft;
>
> 2. Damage claims have been negligible;
>
> 3. No special handling or attention in stowage is required, nor is it necessary to protect the commodities from heat due to movement of the traffic during cool seasons of the year;
>
> 4. Absence of any claims due to perishability;
>
> 5. Strong packaging, average size and weight of cartons and ease of handling constitute favorable characteristics;
>
> 6. The traffic generally moves in shipments larger than the average weight of LTL shipments and is tendered in multiple LTL shipments, which is also a favorable characteristic; and
>
> 7. That the traffic moves in its greatest volume during a time of year when carrier revenues and tonnages are generally depressed, and that expeditious service is not required since the movements commence well before the holidays for which purchased.

The NCA also argues that since the foil-wrapped Easter eggs and the hollow mold rabbits, et cetera, are transported during the same period, in the same shipments and for use during the same holidays, the hollow mold sugar confections compete with the hollow mold chocolate and such factor must also be considered as a relevant transportation characteristic in the classification of the commodities (Tr. 147).

No serious issue is raised with respect to the *modus operandi* pursued by the NCB in the conduct of its platform study affecting density determinations, but the NCA points to alleged disparities and deficiencies, and challenges the completeness of the survey to the extent that the conclusions drawn therefrom by the NCB are erroneous and unreliable; and, that respondent places unwarranted and controlling reliance upon the density data of hollow mold confectionery which it has collected and presented in this proceeding.

DISCUSSION AND CONCLUSIONS

As the parties correctly point out, section 216(b) of the act (49 U.S.C. 316(b)) requires every common carrier of property by motor vehicle to "* * * establish, observe, and enforce just and reasonable rates, charges, and classifications * * *" and section 216(g) of the act (49 U.S.C. 316(g)), imposes the burden of proof upon the proponents of any change in rate, charge, or classification.

A freight classification is a division into groups of the commodities transported by common carriers according to the transportation characteristics of the commodities in order to assure all commodities bear a fair share of the transportation burden. In *Barshi & Son v. Baltimore & O. R. Co.*, 155 I.C.C. 350, the Commission stated a freight classification "with reference to which rates are made" is a grouping of the commodities which move by freight into a limited number of classes, and that all commodities which are entitled under normal conditions of transportation to the same, or substantially the same rate, are assigned to the same class. For each group of commodities as thus classified, carriers must establish a class rate, which rate, likewise under normal conditions of transportation, must be reasonable for application to all the commodities in that class.

In *Motor Carrier Rates in New England*, 47 M.C.C. 657, 660-661, the Commission categorized those transportation characteristics[1] of commodities which are properly considered in fixing classification ratings, namely—

1. Shipping weight per cubic foot.
2. Liability to damage.
3. Liability to damage other commodities with which it is transported.
4. Perishability.
5. Liability to spontaneous combustion or explosion.
6. Susceptibility to theft.
7. Value per pound in comparison with other articles.
8. Ease or difficulty in loading or unloading.
9. Stowability.
10. Excessive weight.
11. Excessive length.
12. Care or attention necessary in loading and transporting.
13. Trade conditions.
14. Value of service.
15. Competition with other commodities transported.

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[1] The various described factors were more recently reiterated in *Increased Freight Rates and Charges, 1972*, 346 I.C.C. 88, 107, and, citing in accord, *All States Frgt. v. New York, N.H. & H.R. Co.*, 379 U.S. 343; *Class Rate Investigation, 1939*, 262 I.C.C. 447, 508; *Investigation and Suspension Docket 76*, 25 I.C.C. 442, 463, 472-72, and *Proctor & Gamble Co. v. C., H. & D. Ry. Co.*, 9 I.C.C. 440, 482.

Of the foregoing transportation characteristics, those which are deemed relevant by the respondent in the instant proceeding include: (1) density, i.e., shipping weight per cubic foot; (2) value per pound; (3) perishability; (4) liability to damage; (5) care or attention necessary in loading and transporting; and, (6) stowability.

Manifestly, the respondent relies chiefly upon the allegedly low density factor of hollow mold candy to support the proposed changes in classification (exhibit 5, p. 6). On the other hand, protestant clearly attributes less than primary significance to the element of density and contends that other more favorable characteristics of the considered commodities warrant continued application of the present class 85 "Any Quantity" rating. The protestant does not appear to disregard nor derogate the element of density as a substantive factor to be considered for classification purposes, but rather seeks to show that the low density figures submitted in evidence by respondent are unreliable, if not erroneous, to the extent that on their face they are not sufficient to predicate an accurate and precise calculation of the densities of the commodities.

In the present state of the record, it is apparent that all parties substantially concur in those transportation characteristics of hollow mold confections which are indeed relevant to determination of an appropriate classification rating. Although respondent does not consider the susceptibility of the commodities to theft, protestant has introduced evidence that, to the extent of at least one carrier's experience, pilferage or theft is minimal and, therefore, constitutes a favorable characteristic. Consequently, this factor will also be considered in connection with the other relevant transportation characteristics. The principal point of disagreement lies in the proper weight to be accorded the various characteristics. Under these circumstances it is encumbent to review, ***seriatum***, the evidence bearing upon each materially dispositive element.

An examination of precedent indicates that the Commission has not seen fit to assign arbitrary or numerical values to the various transportation characteristics with a view to fit commodities into precise groups with mathematical certainty nor, in view of the variables involved, does such course appear practical of feasible. Rather, the ultimate determination rests upon a balanced, value judgment affecting all applicable characteristics common to a single freight grouping. Necessarily the relevant elements must vary appreciably in importance with the class of articles sought to be embraced within a particular class. The matter of weight, however, constitutes an element in establishing freight charges that is common to all commodities wherever and by whatever mode a commodity is transported. Hence, wherever space is involved the matter of density must necessarily be an integral consideration in classifying freight. Moreover, weight/density determines to a certain extent the relative efficiency of the utilization of equipment, because there is a direct relation between the cubic loading capacity and the maximum load which a vehicle can carry. This factor is seen to be particularly true in the case of relatively light and bulky articles of commerce. In *Incandescent Electric Lamps or Bulbs*, 44 M.C.C. 501, 512, the Commission stated:

> In the light of the paramount importance of space in the determination of reasonable motor carrier classification ratings, we are of opinion such ratings should be so arranged that, so far as practicable, as the densities of the commodities decrease, the revenue thereon should remain approximately equal, that the application of one rating to a group of commodities having too great a range in weight densities militates against this principle and that, therefore, there is need for much greater refinement in motor-carrier ratings than has heretofore been the rule in fixing classification ratings on freight moving by rail ***

In a subsequent report of the above-entitled proceeding, 47 M.C.C. 601, 603, the Commission stated:

> The carriers have been admonished by the Commission to establish reasonable ratings in the classification proper rather than higher exceptions ratings. We believe it inescapable that, in the light of the limited capacities of motor-carrier equipment, as compared with the capacities of railroad freight cars, density, which has always been regarded as an important factor in determining rail classification ratings, merits more consideration in determining the reasonableness of motor classification ratings, than it has heretofore been accorded ***

And at p. 606:

> We affirm our finding in the prior report, that in fixing ratings on articles moving by motor common carrier the density of the article must be accorded more consideration than has heretofore been the case ***

Clearly, the conduct of the platform study was carried out in an objective and professional manner. There is no serious question raised to the contrary—nor that it was performed at other than during an appropriate period of time during the flow of such traffic—nor that the inspection sampling was less than representative of the considered products in general. Qualitatively and quantitatively, the record supports a finding that the survey was reasonably and fairly conducted. Obviously, as with any study or survey of this nature, a more complete and exhaustive effort conceivably could have been exerted, but this record does not disclose errors or discrepancies of a magnitude to warrant disregard of the density figures in evidence. The errors or omissions alleged to exist in respondent's density analysis appear to some extent conjectural and undeveloped on this record; and, where they do appear to exist they are deemed minor and insufficient to materially detract from the density profile established by respondent.

Moreover, it is clear that protestant was on notice, both from this and prior proceedings before the Commission, that the element of density affecting hollow mold confections was material and relevant to classification—particularly with respect to the relative light and bulky nature of this freight—that the matter of density presented a readily foreseeable issue herein—and, that protestant had ample opportunity to submit rebutting evidence, the character of which was as readily available to protestant, if not more so, as to the respondent. This course of action the protestant chose not to follow and, consequently, it may be inferred that either the element of density was not deemed of sufficient import to warrant presentation of evidence bearing on the question, or that density data would not favor its cause in seeking to continue application of the existing class 85 rating.

The record fairly establishes average densities of about 6.15 pounds per cubic foot, by carton, and 6.24 pounds per cubic foot, by model, on hollow mold chocolate, other than foil-wrapped eggs; and average densities of 11.50 pounds per cubic foot on the sugar molded confections.

A long-recognized test of the reasonableness of a classification rating is the relationship that a commodity bears to the ratings applied on commodities having similar transportation characteristics. The proposed LTL class 125 for hollow mold chocolate compares favorably to a number of other density related commodities. For example:

In *Classification Ratings, Drinking Straws*, 335 I.C.C. 1 (1969), the Commission found an LTL class 125 appropriate for paper straws having an average density of 6.5 PCF. In I. & S. Docket No. M-24023, *Classification Ratings, Screen Doors or Window Screens*, Report and Order of Review Board No. 4, served January 8, 1971 (not printed), an LTL class 125 approved as to articles with an average density of 5.67 PCF. The same class rating was approved by order of the Commission, Review Board No. 4, served September

12, 1973, under I. & S. Docket No. M-26631, *Classification Ratings on Door or Window Frames, Nationwide* (not printed), for commodities with an average density of 5.8 PCF; and similarly, in I. & S. Docket No. M-24486, *Classification Ratings on Imitation Fireplaces, Nationwide,* Report and Order, Review Board No. 4, served July 8, 1971 (not printed), an LTL class 125 rating was approved on articles with an average density of 7.41 PCF.

Moreover, as pointed out by respondent, the Commission has approved higher LTL ratings than the LTL class 125 proposed on the considered commodities upon articles with density characteristics similar to that of hollow mold chocolate.[2]

That value is also one of the elements to be considered in the classification of commodities is firmly established. The necessity therefor is the failure of some traffic, highly essential but of low value, to meet fully the transportation burden. To offset this failure, articles of higher value and less economic utility must be rated above the average cost of the service, otherwise it would not be possible to maintain the transportation system.

Little, if any dispute exists with respect to the value of hollow mold chocolate which has been approximated at $1.70 per pound. The singular evidence affecting the value of the molded sugar confections is fixed at $1.61 per pound. As protestant points out the value for molded sugar is based upon a telephone conference with only a single manufacturer. However, since the reporting manufacturer is the only known supplier of sugar mold, the information obtained may be considered reliable, irrespective of the means used to communicate the information to respondent. This is particularly so in the absence of any evidence to the contrary.

The evidence is somewhat more conflicting in connection with the perishable quality of hollow mold. Respondent points (1) to the cited notations on shippers' bills of ladings, as well as similar language appearing on some carrier's freight bills; and, (2) the need for protection of the commodities from heat. The argument advanced by protestant that the shipper notations are merely "perfunctory" is manifestly without merit. The plain language of the direct precautionary instructions embodied in the notations cannot simply be interpreted out of existence and must be taken literally in the absence of ambiguity. Furthermore, the so-called market perishability factor is properly considered in view of the seasonal nature of the traffic. Again, the shipper notations dealing with "Rush Delivery" interpose a requirement upon the carrier that may not be merely ignored—and, to that extent is not a favorable transportation characteristic when compared with traffic not so bound by the restriction.

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[2] *Classification, Burial Cases,* 54 M.C.C. 489 (6.8 PCF—LTL class 200); *Classification of Sheet Steel Cans,* 54 M.C.C. 605 (6.37 PCF—LTL class 200); *Incandescent Electric Lamps or Bulbs,* 47 M.C.C. 601, 615 (6.0 PCF—LTL class 200, and 5.7 PCF—LTL class 150); and *Cereal Food Preparations—Classification Ratings,* 49 M.C.C. 33 (5.8 PCF—LTL class 200).

The testimony of the carrier, Burgmeyer Bros., Inc., that it had paid no claims based upon perishability must be accorded minimal weight since such carrier's operations are confined to relative short hauls of 200 miles and within an area where high outside temperatures pose no serious problem during the period when the bulk of the traffic moves.

An evaluation of the element of perishability is, therefore, convincing that such factor constitutes a generally unfavorable transportation characteristic.

During the course of hearing and on brief, considerable attention by the parties has been devoted to the susceptibility of hollow mold articles to damage. Briefly summarizing, the NCB relies essentially upon the very nature of the product itself, i.e., fragility, although conceding that damage claims filed with, or at least paid by, carriers is not impressive. Protestant, on the other hand, directs attention to the correspondence from numerous motor carrier participants in the NMFC who assert transit loss and damage in connection with the products are no problem. Indeed, it appears that many carriers generally, and Burgmeyer in particular, regard this factor as a highly favorable characteristic. In the final analysis it appears that the "proof of the pudding is in the eating," and that the minimal number of damage claims is convincing that, at least as far as the transporting carriers are concerned, the products' susceptibility to damage is not an unfavorable characteristic. Whether the lack of damage claims may be attributable to stronger packaging, carrier declination of claims, or liberal breakage allowances, so long as carriers are not required to pay claims they do not suffer.

Testimony was received from the witness on behalf of carrier Burgmeyer Bros., that the hollow mold products are shipped in containers which are strong, average and uniform in size to facilitate stacking, and that the ease in handling and stowage makes the commodity attractive from a transportation standpoint. The NCB, however, asserts the fragile nature of the contents of the cartons requires special handling, a need to load the cartons a safe distance from cargo heaters, and that heavier freight may not be stacked or top-loaded upon the cartons, without risk of loss. On the basis of this record, and the dictates of common sense, the evidence is persuasive that some degree of special handling and careful stowage is required for protection of the considered candy products and such element is less than a favorable characteristic, albeit not dominant or controlling herein.

A careful evaluation of each of the transportation characteristics, individually and collectively, which are considered to bear the greatest relevance to hollow mold candy or confections, compels the conclusion that, on balance, the average density of the commodities must be accorded the single most important consideration for purposes of just and reasonable classification commensurate with the view that such commodities bear their fair share of the transportation burden. Although the element of perishability of the products, including "market perishability" is persuasive of an unfavorable characteristic, it is not sufficient, *per se*, to warrant any clear-cut decision on the reasonableness of the proposed LTL class 125 rating. The care and attention necessary in loading and transporting the considered freight appears to pose certain difficulities, as noted by the precautionary instructions that appears on the shipping documents, and the necessity for a certain amount of protection from high temperatures. The element of stowability presents no unusual difficulties for the carrier, but the ease of loading does not rise to a degree that warrants a finding this factor constitutes a distinctly favorable characteristic, particularly when some caution is required against top-loading with heavier freight. Insofar as the susceptibility of the commodities to damage is concerned, this record can hardly justify a finding of serious problems in this area where damage claims appear to be minimal, or of a potential and theoretical nature. It is, therefore, concluded that the last mentioned characteristic is more favorable than unfavorable.

In summary, it clearly appears that the dominant characteristic common to the considered grouping of commodities is density and on such basis, supported to a lesser degree by factors affecting perishability, care and attention in loading/transporting, stowability and the relative value of the commodities, warrants approval of the proposed LTL class 125 rating.

In view of the substantial disparity in the density character of hollow mold candy, as compared with eggs, foil wrapped, and the molded sugar confections, separate classification of such commodities is deemed fully warranted.

And lastly, the ratings and minimum weights proposed for the various categories of hollow mold candy are reasonably related to the ratings and minimum weights which have been applied on commodities having similar transportation characteristics.

FINDINGS AND ORDER

Upon consideration of all the evidence of record, it is found that the proposed changes in class 85 AQ rating presently applicable on "Candy or Confectionery, hollow mold, chocolate or other than chocolate" under item 39960, are shown to be just and reasonable, and not otherwise unlawful.

It is further found that this decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

It is ordered, That this proceeding be, and it is hereby, discontinued.

APPENDIX A

Company	Number of observations	Average density (PCF)	Density range (PCF)
Bortz	898	6.59	2.52 - 13.20
Berkshire	87	5.01	3.36 - 7.96
Zachary	83	5.81	3.84 - 6.78
Luden's	151	5.75	4.79 - 6.59
Palmer	694	6.49	4.22 - 12.25
Frankford	496	6.33	380 - 12.86

The overall company average density is 6.0 pounds per cubic foot (exhibit 1, p. 7).

APPENDIX B

Company	Number of models	Average density (PCF)
Bortz	47	6.5
Berkshire	14	5.82
Zachary	9	5.55
Luden's	16	5.71
Palmer	74	6.78
Frankford	37	6.09

The overall company average was computed to be 6.07 pounds per cubic foot (exhibit 1, p. 9).

APPENDIX C

Company	Average density (PCF)
Bortz	5.56
Berkshire	5.01
Zachary	5.81
Luden's	5.75
Palmer	6.46
Frankford	6.33

The overall company average density was shown to be 5.82 pounds per cubic foot (exhibit 1, p. 10-11).

APPENDIX D

Item	Description	Density (PCF)		Value per pound	
		Average	Range	Average	Range
20230	Automobile Ramps, Runways, SU	6.91	5.69-12.50		
25090	Paddles, NOI	6.91	3.66-11.60	$1.45	$0.68-$1.91
34480	Sub 4, Doors, cold storage room	6.70	6.21-15.17		
36266	Sub 1, Curbs, roof, SU	6.50	3.42-19.22		
38540	Sub 1, Kennels, SU	7.10	5.39-9.26	0.89	0.66-1.27
39920	Candy, Chewing Gum, or Candy or Chewing Gum and Toys or Novelties	7.87	4.60-11.65		
60360	Egg Case or Egg Carrier Filler Flats	6.80	5.60- 7.50	0.18	
61040	Blankets or Sheets, electric	6.10	2.34-18.58	1.95	
62250	Sub 1, Heaters, industrial, radiant, electric	6.86	4.80-8.90	2.82	1.85-3.51
71460	Flower Pots	6.24	5.33-7.10		0.19-0.78
86310	Sub 4, Gates, doorway or porch	7.08	5.62-10.50	0.61	
109095	Sub 3, Diffusers	6.72	4.00-12.00		
101330	Racks, plate storage	7.60		1.04	
107680	Irrigation Siphon Tubes	8.00	6.00-8.00		
108730	Boat Boarding Ladders	6.60			
115430	Sub 2, Buckets, concrete conveying	7.21	4.02-10.71		
117340	Sub 2, Coolers	6.63	4.87-12.29	1.34	0.90-1.55
124564	Machines, air filtering	6.20	3.38-18.68		
126157	Sub 2, Operators, garage door	5.94	3.36- 9.62		
72400	Chips, Twists or Puffs	7.17	2.90- 13.0	.57	
37080	Screen Doors	5.67	3.95-11.73	.78	
69400	Fireplaces, imitation	7.41	6.44- 8.69		.60-1.00
179660	Drinking Straws				
	Paper	6.5	3.98-10.28		.35-.45
	Plastic	5.9	3.20-10.20		.35-.45

EX PARTE NO. 252 (SUB-NO. 1)

INCENTIVE PER DIEM CHARGES—1968

Decided January 21, 1977

Upon consideration of comments filed in response to the Commission's order of February 6, 1976, section 1036.4 of Title 49, Code of Federal Regulations, amended to provide for a single 1964-68 test period average for all types of unequipped general service boxcar transactions and to give carriers the option of a matching fund requirement in lieu of the test period average.

Harry J. Breithaupt, Jr., Robert L. Calhoun, Martin L. Cassell, James I. Collier, Jr., John A. Daily, Earl E. Eisenhart, Jr., Richard M. Gleason, Katherine M. Griffin, Milton E. Nelson, Jr., David M. Schwartz, Scott W. Scully, William W. Staton, and *M. H. Weisman* for interested parties.

REPORT OF THE COMMISSION

BY THE COMMISSION:

This proceeding was reopened by order served February 6, 1976, to determine whether section 1036.4, Title 49 of the Code of Federal Regulations[1] should be amended as it applies to test period

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[1] §1036.4 *Use of funds on boxcars.*—The net credit balances resulting from incentive per diem settlements on boxcars, which are earmarked in accordance with § 1036.3, may be drawn down in whole or in part at any time by the carrier to build, lease equivalent of purchase, or purchase, in whole or in part, new unequipped boxcars for general service described in § 1036.1, *provided*, the carrier has in the same calendar year built, leased, or purchased its 1964-68 average acquisitions of such boxcars and made up an [sic] arrearage in having failed to maintain such average each year this order is in effect. Earmarked funds may also be used in whole or in part to lease any number of new unequipped boxcars for general use described in § 1036.1 in which the carrier is not acquiring an equity interest, *provided*, the carrier has in the same calendar year leased its 1964-68 average number of such boxcars and made up any arrearage in having failed to maintain such average each year the order is in effect. Nonequity leases must be at least 10 years in duration, and, in connection with such leases, earmarked funds must not be used for the cost of maintenance. Earmarked funds may be used in whole or in part to rebuild any number or portion of general service, unequipped boxcars described in § 1036.1, *provided*, the carrier has in the same calendar year rebuilt its 1964-68 average number of such boxcars and made up any arrearage in having failed to maintain such average each year the order is in effect. Net balances on Canadian-owned cars may be drawn without regard to prior acquisitions, but where the designee is a class I United States carrier such drawdowns shall not affect that carrier's accumulation of arrearages. However, upon application, including a showing that all parties to the proceeding herein have been notified by the carrier of such application and a showing of good cause why any carrier is unable to draw down in whole or in part the net credit balance resulting from incentive

(footnote continued on next page)

averages on nonequity leases for unequipped general service boxcars (hereinafter boxcars). We noted that since the use of nonequity leases is a relatively new concept, in many cases the 1964-68 test period average would not be applicable. Interested parties were requested to submit their views on whether the 1964-68 test period should be replaced with a different test period, a matching requirement or some other requirement and to comment on "any other related matter."

BACKGROUND

Under section 1(14)(a) of the act as amended in 1966 and 1976,[2] the Commission, based on a concern for the adequacy of the national freight car supply, instituted the incentive per diem program to "provide just and reasonable compensation to freight car

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(footnote 1 continued)

per diem settlements because it cannot comply with the above test period average requirement of having in the same calendar year built, rebuilt, leased, or purchased its 1964-68 average number of such boxcars and made up any arrearage in having failed to maintain such average each year this order is in effect, the Commission may, in its discretion, after consideration of all views regarding the application, modify the test period average to the extent consistent with the public interest and the national transportation policy. Such modification, as a minimum, shall require that a carrier match the earmarked funds it will use with an equal amount of its own funds. Similarly, a carrier using earmarked funds, in whole or in part, to build, rebuild, lease, or purchase general service, unequipped boxcars of the XF designation, shall only be required, as a minimum, to match the earmarked funds it will use to purchase XF boxcars with an equal amount of its own funds. Earmarked funds must be put to use within 18 months after the end of the calendar year in which the funds are collected and result in a net credit balance for the building, rebuilding, leasing, or purchasing of general service, unequipped boxcars described in § 1036.1 for addition to such carrier's or designee's fleet in accordance with this part. Upon a showing of good cause an application, including a showing that the parties to the proceeding herein have been notified by the carrier of such application, may be made to the Commission for waiver of the said 18-month period, which may, in the Commission's discretion, be granted after consideration of all views regarding the application. If the earmarked funds are not used within the 18-month period, they may be voluntarily surrendered to Rail Box whose establishment and operation was approved in *American Rail Box Car Co.—Pooling*, 347 I.C.C. 862. If the carrier fails within the stated period to put to use collected earmarked funds which result in a net credit balance, has not obtained relief from that requirement, and has not surrendered such funds to Rail Box, the Commission will investigate the matter to determine what, if any, corrective action is warranted. Appropriate corrective action would include section 16(12) remedies among others. Carriers may make temporary investments of unexpended funds in Government bonds or other liquid securities. Such securities must be readily convertible to cash so that funds remain available for boxcar purchases. Interest earned must become part of the earmarked fund. As used in this section and § 1036.5, "build," "rebuild," "lease," or "purchase" refer to the commitment to build, rebuild, lease, or purchase which results in the acquisition of a car on line ready for use within 10 months from the date of commitment, except that in extraordinary cases beyond the control of the carrier or the car supplier, a car that is delivered after 10 months from the date of commitment may qualify if approved by the Bureau of Accounts of this Commission.

[2] Section 1(14)(a) of the Interstate Commerce Act (49 U.S.C. 1(14)(a)) reads as follows:

> 1(14)(a) It is the intent of the Congress to encourage the purchase, acquisition, and efficient utilization of freight cars. In order to carry out such intent, the Commission may, upon

(footnote continued on next page)

owners, contribute to sound car service practices (including efficient utilization and distribution of cars), and encourage the acquisition and maintenance of a car supply adequate to meet the needs of commerce and the national defense." To attain these goals, the Commission stated that this proceeding would be continuing and "open-ended." The incentive per diem charges originally applied for a 6-month period and could be used to build, purchase, or rebuild boxcars. *Incentive Per Diem Charges—1968*, 337 I.C.C. 183 (1969); and 337 I.C.C. 217 (1970). By order of March 30, 1973, the Commission expanded incentive per diem to year-round applicability, stating that the Nation was facing its most severe shortage of boxcars in the Commission's history which was caused in part by the Russian wheat sale. In our decision in this proceeding at 350 I.C.C. 464 (1975), we returned the application of incentive per diem to a 6-month period. We stated in our decision herein that incentive funds could also be drawn down for leases the equivalent of a purchase, 343 I.C.C. 49, 59-60 (1973). And, at 349 I.C.C. 303, 325-26 (1975), we allowed carriers to draw down their incentive funds on nonequity leases entered into after January 1, 1975. We have made incentive per diem applicable on XF cars, *Incentive Per Diem Charges—1968 (XF Cars)*, 350 I.C.C. 11 (1975), and we have instituted a rulemaking proceeding to determine whether incentive charges should apply on gondola cars.

(footnote 2 continued)

complaint of an interested party or upon its own initiative without complaint, and after notice and an opportunity for a hearing, establish reasonable rules, regulations, and practices with respect to car service by common carriers by railroad subject to this part, including (i) the compensation to be paid for the use of any locomotive, freight car, or other vehicle, (ii) the other terms of any contract, agreement, or arrangement for the use of any locomotive or other vehicle not owned by the carrier by which it is used (and whether or not owned by another carrier, shipper, or third party), and (iii) the penalties or other sanction for nonobservance of such rules, regulations, or practices. In determining the rates of compensation to be paid for each type of freight car, the Commission shall give consideration to the transportation use of each type of freight car, to the national level of ownership of each such type of freight car, and to other factors affecting the adequacy of the national freight car supply. Such compensation shall be fixed on the basis of the elements of ownership expense involved in owning and maintaining each such type of freight car, including a fair return on the cost of such type of freight car (giving due consideration to current costs of capital, repairs, materials, parts, and labor). Such compensation may be increased by any incentive element which will, in the judgment of the Commission, provide just and reasonable compensation to freight car owners, contribute to sound car service practices (including efficient utilization and distribution of cars), and encourage the acquisition and maintenance of a car supply adequate to meet the needs of commerce and the national defense. The Commission shall not make any incentive element applicable to any type of freight car if the Commission finds that the supply of such type of freight car is adequate. The Commission may exempt such incentive element from the compensation to be paid to any carrier or group of carriers if the Commission finds that such an exemption is in the national interest.

As a condition to drawing down incentive funds, which were to be earmarked in a separate fund, the Commission required that a carrier first meet its normal annual boxcar acquisitions or test period average from its general funds. The Commission felt that if the congressional purposes of expanding the car fleet and improving utilization were to be met, there had to be a standard of measure such as the test period. Otherwise, the carriers could simply use their incentive funds to purchase their ordinary car replacements and thus merely maintain the *status quo* within the national car fleet. To determine what are the normal annual acquisitions, a representative 5-year period of 1964 through 1968 was used. The average annual number of boxcars acquired during that 5-year period, plus any arrearages from this average in prior years, must be purchased, built, rebuilt, leased equivalent to purchase, or nonequity leased out of general operating funds before a carrier may expend net incentive per diem credit balances for these same purposes. Based on the objections of certain carriers that the 1964-68 test period average was inequitable since some carriers had purchased an unusually large amount of boxcars during those years and thus had exceedingly difficult test period averages to meet, the Commission amended its regulations. A carrier was allowed, upon application to the Commission and notification of all parties, to attain a modification of the test period average upon a showing of good cause. Such modification, as a minimum, would require a carrier to match from its general funds the amount it spends from its net credit balance of incentive funds. 349 I.C.C. at 314-15, 332. In our XF car proceeding, a different situation was involved, since the "XF" designation did not exist prior to 1973 and thus the 1964-68 test period was impractical. The only requirement we imposed upon carriers wishing to draw down incentive funds was that they match incentive expenditures with general corporate fund expenditures. 350 I.C.C. at 21.

COMMENTS OF THE PARTIES

A statement was filed by SSI Rail Corp. (SSI), a wholly owned subsidiary of the ITEL Corporation. SSI purchases and leases boxcars and thereupon leases these cars to short-line railroads. The railroad is then solely responsible for the operation of the cars and lease payments consist exclusively of a portion of car-hire revenues received by the railroad from off-line use of the cars. SSI states that over the next 5 years it plans to acquire and manage a fleet of 6,000 boxcars. Such additions are necessary since the boxcar fleet is aging, with 35 percent of cars over 20 years old. Thus, SSI submits that it is helping to reduce the continuing boxcar shortage and improve the viability of the railroads which are its lessees.

SSI argues that the independent (nonrailroad) fleet, which now consists of 3-5,000 cars, would grow to approximately 25-50,000 cars in the next 5 years provided some stability can be introduced into the basic economic of the business. SSI alleges that without such stability, lenders will be reluctant to continue to lend for equipment acquisitions based on projections that have been significantly altered by the Commission. For instance, SSI contends that the Commission's decision in this proceeding at 350 I.C.C. 464 (1975) which cut incentive per diem back to 6 months on boxcars, caused a significant variation in the earning power of an asset after its acquisition. It also argues that our February 6, 1976, order instituting this proceeding created uncertainty regarding the use to which funds earned by the asset after acquisition may be put.

For these reasons, SSI argues that the Commission should adopt a "grandfather clause" or regulation that will maintain the incentive rate at the level existing at the time these leases or purchase commitments are made and that changes made in that level in the future will not apply retroactively to existing leases. In the alternative, SSI contends that the Commission could stabilize the basic economics of the industry by replacing incentive per diem with an increased straight per diem equal to or greater than the current straight per diem including the incentive element. Such a solution, it is alleged, would eliminate the need for a base period; end the in-fighting between western and eastern railroads since the increase in straight per diem would be viewed as not subject to constant revision; restore lender confidence since per diem has historically not been reduced; eliminate cash management problems resulting from the cyclical nature of different car-hire payments during the year; and increase additional types of cars that may be in short supply by examination of the role of independents because of a general increase in straight per diem.

SSI also states that it opposes the matching fund requirement in addition to, or in lieu of, a test period. It contends that major as well as short-line railroads do not have the funds available and would thus be unable to draw down their incentive funds. Finally, SSI states that it does not regard the existing 1964-68 test period as a problem since the carriers it leases equipment to own few, if any, cars.

The Association of American Railroads (AAR) alleges that the 1964-68 test period average has been arbitrary and ineffective as a means for regulating the expenditure of incentive funds and that it should be eliminated not only for nonequity leasing but altogether. It adds that if there is to be any restriction on the expenditure of incentive funds it should be no more than a matching basis.

The AAR argues that substantial amounts of incentive funds have remained unexpended and will continue to be so unless the 1964-68 test period and other restrictions on expenditures are eliminated or modified to afford more flexibility. The test period, it is argued, has in some cases been a hindrance rather than an encouragement to railroads in acquiring freight cars with incentive funds; if a railroad made extraordinarily large purchases of boxcars during the 1964-68 test period an unrealistically high car acquisition quota would be established which that railroad would have difficulty in meeting in order to draw down incentive funds. As of December 31, 1975, the AAR states that the Union Pacific had accumulated $22 million in incentive funds and for all railroads the figure is $35 million. (Based on the latest information the amounts unspent are $27 million and $50 million, respectively.)

The AAR acknowledges that in our decision at 349 I.C.C. 303, we allowed the 1964-68 test period to be modified upon good cause provided the carrier spent at least an equal amount from its general funds as it spent from its incentive funds. A matching fund requirement, they contend, would be a helpful and progressive improvement upon the test period restriction; however, it would be of little help to a carrier who had many thousands of dollars in its incentive fund and only a few thousand in its general fund.

Finally, the AAR argues that incentive funds should be used for the repair and maintenance of freight cars. It cites section 1(14)(a) of the act which states that incentive per diem shall "encourage the acquisition and *maintenance of a car supply* adequate to meet the needs of commerce and the national defense." [Emphasis added.] They also contend that there is nothing in section 1(14)(a) that requires incentive charges to be earmarked, placed in a special account, or restricted in any way as to expenditures. They feel that with unstable economic conditions and constant fluctuations in the money markets, the railroads need more flexibility and room for managerial judgment in the expenditure of incentive funds.

The Rock Island states that it has opposed incentive per diem on the ground that it is counterproductive and neither increases car supply nor improves utilization. It adds, however, that so long as incentive per diem payments continue in force that the conditions imposed upon their use should be retained in their entirety. The Rock Island contends that if the Commission should diminish the requirements presently imposed on creditor lines—to add to their own fleet with their own resources as a condition to using money obtained as a creditor line of incentive per diem payments—the whole procedure simply becomes an unqualified bonus to the owning carriers. With each relaxation, the system comes closer to an unconditional transfer of funds from debtor to the creditor, a system whereby one set of railroads supply the funds to add to the fleets of another set of carriers.

The Consolidated Rail Corporation (ConRail) opposes the AAR request that the present restrictions on incentive per diem be eliminated, arguing that it would deprive ConRail and other debtor railroads of due process.

The Southern Railway urges the elimination of the test period average entirely but opposes further discrimination in the test period average between types of cars or between cars of the same type according to the financial arrangements under which they were acquired. Thus, the Southern submits that carriers acquiring boxcars under nonequity leases should not be relieved of the test period quota unless the same treatment is given carriers which purchase or rebuild cars.

The Southern argues that the test period average is the single greatest obstacle to the attainment of the goal of the incentive program. It is allegedly deficient because it does not establish a valid base by which to measure normal acquisition and rebuilding quotas to be met by the carriers before using incentive funds; it fails to test the capability of credit balance carriers to expand their fleets; and it has caused large amounts earned from incentive per diem to be frozen.

In conclusion, the Southern adds that if the test period average is not eliminated entirely, it should be replaced by a matching requirement applicable not only to nonequity leases but to all types of incentive transactions on boxcars.

The Detroit, Toledo and Ironton Railroad Company submits that the test period averages should be retained, at least for those carriers making use of this form of financing during the test period and that they should not now be required to obtain cars under a matching basis since this would simply serve to further restrict the use of these funds for their intended purpose. It notes that it has been financing boxcars under nonequity leases since 1967.

The Western Pacific Railroad favors the removal of restrictions on incentive expenditures. It notes that nonequity leases are a useful tool for smaller roads which do not have the flexibility of larger roads in planning equipment acquisitions. The Western Pacific thus favors no restrictions. Although it "can live with the 1964-68 test period," the Western Pacific believes that carriers should have the option, without any matching funds requirement, to select other periods more suitable to the carrier's situation.

The Maine Central favors retention of the 1964-68 test period but would not be opposed to the establishment of different test periods to permit carriers a choice in meeting test period requirements. It argues that the key issue is flexibility so that railroads are not hampered by restrictive guidelines in adding boxcars to the national car fleet.

The Burlington Northern and the Santa Fe, in separate statements, support a relaxation of existing restrictions on the utilization of incentive funds.

The Atlantic & Western's statement pertained to nonequity leases on XF cars and is thus beyond the scope of this proceeding.

FINDINGS AND CONCLUSIONS

As we stated in a prior report in this proceeding, the test period average "appears to be the most significant obstacle preventing the incentive per diem program from being fully successful." 349 I.C.C. at 314. We do not believe, on the other hand, that elimination of the test period average would make the incentive per diem program for boxcars[3] any more successful. As we noted in our initial reports in this proceeding, without some restrictions on the drawing down of incentive funds, carriers could simply use these funds to purchase their normal car replacements and thus merely maintain the *status quo* within the Nation's car fleet. Such a consideration takes on more meaning today with the steady and continuing decline in the ownership of boxcars, although part of the decline is due to specialized cars performing tasks formally done by boxcars (see appendix A). We are concerned, too, that elimination of all restrictions on the expenditure of incentive funds creates a system whereby the debtor railroads supply the funds which merely maintain the size of the existing boxcar fleets of the owning carriers.

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[3] The Commission has instituted a rulemaking proceeding, Ex Parte No. 252 (Sub-No. 2), *Incentive Per Diem Charges—Gondolas*. Our comments and findings concerning boxcars are not applicable to gondolas.

On the other hand, the present 1964-68 test period for boxcars is not practical. There are, in fact, not one but three test periods for boxcars: for building, leasing the equivalent of a purchase, and purchasing; nonequity leasing; and rebuilding. Carriers who made significant acquisitions during that period find it difficult to meet their test period. We amended our regulations in our decision at 349 I.C.C. 303 to allow the carriers to modify the test period after notifying all parties of their application and upon a showing of good cause. The carriers have not made use of this procedure. As of April 1, 1976, there was over $50 million in unspent incentive funds, $27 million of which was held by one carrier. With the continuing decline of the ownership of boxcars and the need to upgrade the boxcar fleet, the drawing down of these unspent funds is imperative.

We are thus amending 49 C.F.R. 1036.4 to give the carriers the option, as some of the parties suggested, of either meeting their 1964-68 test period before drawing down incentive funds or matching incentive per diem expenditures with general corporate fund expenditures. We agree with the Southern Railway that it would neither be fair nor practical to amend the test period only for nonequity leases, and we are thus applying this modification to all boxcar transactions: purchasing, building, rebuilding, leasing the equivalent of a purchase, and nonequity leasing. We are also amending the regulations to provide for one 1964-68 test period for boxcars instead of three separate ones for different types of transactions. Thus, the total number of boxcars built, rebuilt, purchased, leased the equivalent of a purchase, and nonequity leased in 1964-68 will constitute the test period number, which will then be used to determine the average annual number of acquisitions. Once a carrier has met this average, plus arrearages, through any combination of the five methods of boxcar transactions, it can draw down its incentive funds for any boxcar transaction. Similarly, as with the case of XF cars, it may match incentive per diem expenditures on one type of transaction with general corporate fund expenditures on another type of transaction.

Where matching funds are to be used to acquire boxcars, such matching funds may not include funds derived from the increases authorized in Ex Parte No. 305 without specific authority from the Commission.

Such a modification of the regulations will hopefully have the effect of facilitating the drawing down of incentive funds and thereby increase and improve the Nation's boxcar fleet. It should be noted that in attempting to attain this congressional objective, the

Commission at 349 I.C.C. 303, 320, required that carriers with net incentive credit balances to expend these funds within 18 months after the end of the calendar year in which the funds are collected. This requirement applies to all earmarked incentive per diem funds, whether they were collected before or after the effective date of our order in this proceeding at 349 I.C.C. 303 (1975). We are amending section 1036.4 to clear up any ambiguity on this matter. We are also amending section 1036.4 to state, consistent with our September 9, 1975, order in this proceeding, the effective date for nonequity lease contracts.

Finally, we find certain other contentions and proposed modifications of the parties to be without merit. Section 1(14)(a) of the act does not state, despite the AAR's contention, that incentive funds can be used for the repair and maintenance of boxcars. Instead, it provides for the attaining and preserving of a boxcar supply adequate to meet the needs of commerce and the national defense through the acquisition of boxcars. The Commission has stated that one form of acquisition is rebuilding. We must also reject the AAR's argument that section 1(14)(a) does not require incentive charges to be earmarked, placed in a special fund, or restricted in any way as to expenditures. The statute provides that the Commission "may *** establish reasonable rules, regulations, and practices." These requirements have been deemed necessary for the success of the incentive program. And, we cannot accept SSI's argument that to insure nonrail investors that the earning capacity of an asset is constant and not subject to short-term shifts, the Commission should either increase straight per diem or introduce a grandfather clause. The Commission has often stated that this proceeding would be "open-ended" in order to best attain the goal of a boxcar supply that is adequate for the Nation's needs. The "short-term shifts" that SSI refers to have been taken after the Commission has listened to the views of all parties, carriers and noncarriers alike. The Commission has, over the years, generally broadened and liberalized the regulations pertaining to incentive per diem. These decisions, and the one today, we feel, have on the whole been beneficial to nonrailroad investors but we must also be mindful of the broader congressional purpose.

We find that section 1036.4 of title 49 of the Code of Federal Regulations should be amended as set forth in the hereto attached order and appendix B.

APPENDIX A

Source: Car Service Division Association of American Railroads

Ownership of plain boxcars—class I U.S. roads

January 1, 1969	404,592
January 1, 1970	386,499
January 1, 1971	367,833
January 1, 1972	350,493
January 1, 1973	332,927
January 1, 1974	326,484
January 1, 1975	319,346
January 1, 1976	309,410
November 1, 1976	286,548

APPENDIX B

§ 1036.4 *Use of funds on boxcars.*—The net credit balances resulting from incentive per diem settlements on boxcars, which are earmarked in accordance with § 1036.3, may be drawn down in whole or in part at any time by the carrier to build, lease equivalent of purchase, purchase, or lease in which a carrier is not acquiring an equity interest, in whole or in part, new unequipped boxcars for general service described in § 1036.1, or rebuild any number or portion of unequipped boxcars for general service described in § 1036.1, *provided*, the carrier has in the same calendar year built, leased, purchased, nonequity leased, or rebuilt its 1964-68 average number of such boxcars and made up any arrearage in having failed to maintain such average each year this order is in effect. A carrier may, as an alternative to the 1964-68 test period average, draw down earmarked funds in whole or in part, to build, lease, equivalent of purchase, purchase, or nonequity lease new unequipped boxcars for general service or rebuild unequipped boxcars for general service *provided*, as a minimum, it matches the earmarked funds it will use to obtain these boxcars with an equal amount of its own funds. Where matching funds are to be used to acquire boxcars, such matching funds may not include funds derived from the increases authorized in Ex Parte No. 305 without specific authority from the Commission. Net balances on Canadian-owned cars may be drawn down without regard to prior acquisitions, but where the designee is a class I United States carrier such drawdowns shall not affect that carrier's accumulation of arrearages. A carrier using earmarked funds, in whole or in part, to build, rebuild, lease, purchase or nonequity lease general service, unequipped boxcars of the XF designation, shall only be required, as a minimum, to match the earmarked funds it will use to obtain these XF boxcars with an equal amount of its own funds. Nonequity leases for unequipped boxcars for general service and XF boxcars must be at least 10 years in duration and, in connection with such leases, earmarked funds must not be used for the cost of maintenance nor on leases entered into prior to January 1, 1975. All earmarked funds that have accrued since the inception of the incentive per diem program must be put to use within 18 months after the end of the calendar year in which the funds are collected and result in a net credit balance for the building, rebuilding, leasing, purchasing or nonequity leasing of general service, unequipped boxcars described in § 1036.1 for addition to such carrier's or designee's fleet in accordance with this part. Upon a showing of good cause an application, including a showing that the parties to the proceeding herein have been notified by the carrier of such application, may be made to the Commission for waiver of the said 18-month period, which may, in the Commission's discretion, be granted after consideration of all views regarding the application. If the earmarked funds are not used within the 18-month period, they may be voluntarily surrendered to Rail Box whose establishment and operation was approved in *American Rail Box Car Co.—Pooling*, 347 I.C.C. 862. If the carrier fails within the stated period to put to use collected earmarked funds which result in a net credit balance, has not obtained relief from that requirement, and has not surrendered such funds to Rail Box, the Commission will investigate the matter to determine what, if any, corrective action is warranted. Appropriate corrective action would include section 16(12) remedies among others. Carriers may make temporary investment of unexpended funds in Government bonds or other liquid securities. Such securities must be readily convertible to cash so that funds remain available for boxcar purchases. Interest earned must become part of the earmarked fund. As used in this section, "build," "rebuild," "lease," or "purchase" refer to a commitment to build, rebuild, lease, or purchase which results in the acquisition of a car on line ready for use within 10 months from the date of commitment, except that in extraordinary cases beyond the control of the carrier or the car supplier, a car that is delivered after 10 months from the date of commitment may qualify if approved by the Bureau of Accounts of this Commission.

TITLE 49 - TRANSPORTATION
CHAPTER X - INTERSTATE COMMERCE COMMISSION
SUBCHAPTER A - GENERAL RULES AND REGULATIONS
PART 1036 - INCENTIVE PER DIEM CHARGES ON BOXCARS

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D.C., on the 21st day of January 1977.

EX PARTE NO. 252 (SUB-NO. 1)

INCENTIVE PER DIEM CHARGES—1968

Upon consideration of the record in the above-captioned proceeding including the order served February 6, 1976, and the comments received from interested parties; and

It appearing, That to facilitate the drawing down of incentive per diem funds on unequipped general service boxcars (boxcar), sufficient grounds have been presented to modify the regulations governing incentive per diem to provide for a single 1964-68 test period average for all types of boxcar transactions and to give carriers the option of a matching requirement in lieu of the test period average;

Wherefore and for good cause appearing therefor:

It is ordered, That Part 1036.4 of Subchapter A, Chapter X, Title 49, of the Code of Federal Regulations be, and it is hereby, amended to read as set forth in appendix B of our report herein.

It is further ordered, That a copy of this shall be delivered to the Director, Office of the Federal Register, for publication therein.

And it is further ordered, That this order shall become effective 35 days from the date of service of this order and continue in full force and effect until further order of the Commission.

This decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

EX PARTE NO. 322

EXPEDITIOUS HANDLING OF DIVISIONS OF REVENUE CASES

Decided July 29, 1976

Part 1109.5 of Title 49 of the Code of Federal Regulations modified by the addition of regulations for the expeditious handling of divisions of revenue cases.

General rules adopted pursuant to section 15(6) of the Interstate Commerce Act which provide for the expeditious handling of divisions of revenue cases.

Robert P. Kane and *Gordon P. MacDougall* for the Commonwealth of Pennsylvania.

Carl E. Sanders and *John L. Taylor, Jr.*, for the Southern Governors Conference and Southeastern Association of Regulatory Utility Commissioners.

C. W. Bath for Farmland Industries, Inc.

John M. Cleary, John F. Donelan, and *John K. Maser III* for the National Industrial Traffic League.

Andrew C. Armstrong, Peter W. Asher, Curtis Berg, Fred R. Birkholz, Charles W. Burkett, Jr., Martin L. Cassell, Emried D. Cole, Jr., Peter S. Craig, Richard M. Freeman, Stuart F. Gassner, William P. Higgins, Donald M. Hoerl, Richard A. Hollander, Howard D. Koontz, R. Eden Martin, Theodore N. Miller, Richard J. Murphy, Walter J. Myskowski, Milton E. Nelson, Jr., George M. Onken, Michael E. Roper, Charles M. Rosenberger, George L. Saunders, Jr., Harry G. Silleck, Jr., Richard H. Stokes, James L. Tapley, W. A. Thie, Donald M. Tolmie, Walter G. Treanor, and *Howard J. Trienens* for certain railroads.

REPORT OF THE COMMISSION

BY THE COMMISSION:

INTRODUCTION

The joint rates assessed and collected by common carrier railroads for the transportation of freight from a point on one line to a point on another line must be divided between the participating carriers. This division of revenue between carriers in the railroad transportation of freight is for the most part governed by private agreements, commonly referred to as division sheets, negotiated by the concerned carriers. When the carriers participating in a joint rate are unable to resolve their differences on how the revenue is to be divided, they may, under the provisions of section 15(6) of the Interstate Commerce Act, file a complaint requesting that the Commission prescribe just, reasonable, and equitable divisions. Interterritorial divisions disputes relate to procedures for revenue allocations between territorial rate bureaus which apply to all or a major portion of interterritorial interline traffic. The resulting divisions of revenue cases are among the most complex cases the Commission is called upon to decide. Major divisions cases involve literally hundreds of millions of dollars. For example, in the *Official-Southern Divisions* case the revenues as settled totaled nearly $1/2 billion. *Official-Southern Divisions*, 325 I.C.C. 1, 50 (1965). Other divisions cases concerning only a limited number of carriers or commodities are nevertheless vitally important to those involved. In an attempt to expedite divisions of revenue proceedings, which for a multitude of reasons have often required an extended period of time to resolve, Congress enacted section 201 of the Railroad Revitalization and Regulatory Reform Act of 1976 (RRRRA).[1]

Section 201 of the RRRRA amended section 15(6) of the Interstate Commerce Act by adding new provisions under paragraphs "(b), (c), (d)" designed to expedite the handling of divisions of revenue cases. The prior provisions of section 15(6) are retained and designated paragraph "(a)".

Pursuant to section 201 of the RRRRA, the Commission by order served April 13, 1976, initiated a proceeding to develop rules pertaining to the expeditious handling of divisions of revenue cases. Attached to the Notice of Proposed Rulemaking were three appendixes: appendix A—Amended Section 15(6) of the Interstate Commerce Act; Appendix B—Suggested Guidelines for Preparation and Submission of Relevant Data by the Parties; and Appendix C—Proposed Amendment of Part 1109, Title 49 of the Code of Federal Regulations, by Addition of Rules, Standards and Procedures for the Conduct of Proceeding for the Adjustment of

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[1] The Commission shall within 180 days after date of enactment (February 5, 1976) *** "establish by rule, standards and procedures for the conduct of proceedings for the adjustment of divisions ***."

Divisions of Joint Rates or Fares. Statutory notice of this proceeding was given to the general public by publication in the Federal Register, dated April 19, 1976, Vol. 41, page 16482.

This report consists of an analysis of the major arguments made by the parties, the conclusions of fact and law made thereon by the Commission, and explanation for the regulations now being promulgated (hereinafter referred to as "final regulations").

For convenience the full text of section 15(6) of the Interstate Commerce Act as amended by section 201 of the RRRRA is set forth in appendix A. Appendix B contains summaries of the major arguments made by the parties in their initial statements and replies. Appendix C sets forth the proposed regulations while appendix D contains the final version of the regulations as adopted herein.

In general, the new statute requires that evidentiary proceedings be completed within 1 year after the filing of a complaint and that a final order be issued within 270 days thereafter. Historically, it has often required from 3 to 10 years to finally dispose of a division case; thus, it is apparent that special rules of procedure and evidentiary presumptions must be established to comply with the statutorily imposed time frame limitations in which to dispose of divisions cases.

The purpose of our notice of proposed rulemaking served April 13, 1976, was to elicit constructive comments to develop workable regulations for use in very controversial and complex proceedings. The proposed regulations appended thereto, were drafted in an effort to provide expedited handling of divisions cases while adhering to basic concepts of procedural due process.

Although the final regulations are based on the original version in form, scope, and goals, the statements and replies presented in this proceeding were used extensively in developing the final regulations. Issues raised by the participants but not specifically discussed herein nor reflected in the final regulations have been considered but discussion and resolution thereof has been found unnecessary. The proposed regulations have been modified as warranted to comply with the constructive comments presented by the parties. We recognize that the regulations here adopted may, as experience is gained, warrant refinements and modifications. Accordingly, this proceeding will remain open ended. Parties and concerned persons may petition for further modifications if changes are believed necessary.

*** [A]s greater insight is gained into the usefulness of the various prescribed requirements as well as the possible alternative thereto, *** further modifications of

these procedures will be appropriate. Because of such a possibility, indeed such a probability, this proceeding will be held open so that such further refinements can be readily implemented. *** [*New Procedures in Motor Carrier Rev. Proc.*, 351 I.C.C. 1, 53 (1975).]

DISCUSSION AND CONCLUSIONS

In annoucing the institution of this proceeding, mandated by the RRRRA, the Commission called attention to the fact that the purpose of the new legislation as it related to divisions of revenue disputes was "to make certain that an adequate record is promptly assembled" so that a final decision can be rendered in an expeditious manner. "Thus," it is stated, "if delays are to be avoided, as indeed they must be under the new legislation, it is incumbent upon the Commission and the railroad parties to a divisions dispute to take on greater responsibilities than have previously been assumed in the conduct of such proceedings." "Accordingly," it was proposed, "to establish rules and procedures which will assure to the fullest extent possible that meaningful evidence will be brought before the Commission at the time of filing of a formal complaint."

To prevent delays in the administrative process, the proposed regulations were drafted in a manner designed to utilize to the utmost extent a concept new to Commission procedure, the "notice of intent to file a complaint." After a review of the statements of the parties (see appendix B for a summary of the specific issues discussed by each party), we remain convinced that the "notice of intent to file a complaint" concept has the potential for facilitating the prompt presentation of meaningful evidence in divisions of revenue complaint cases and thus serve to expedite the decisional process. The parties to this proceeding, representing for the most part those who have taken an active role in the past in divisions of revenue proceedings, as complainants, defendants, or interveners generally support the concept of "notice of intent to file a complaint." However, for various reasons generally related to the positions they have taken in past divisions disputes, they object to the Commission's proposed implementing procedures. These objections fall into four broad categories: (1) the rules imply that the Commission proposes to resolve divisions cases solely on the basis of costs, without due consideration being given to the factors given equal weight in section 15(6); (2) the rules were derived from an interterritorial dispute and they do not apply to other types of divisions cases; (3) the rules give prima facie validity to Rail Form A fully allocated costs which some maintain is deficient as a cost standard; and (4) the rules do not give sufficient attention to evidence concerning efficiency and other standards which are seen equally as important as cost. These objections, as well as others, that have resulted in modification of the proposed rules will be subsequently discussed. While obviously it is not possible in this proceeding (as it is not possible in actual divisions of revenue proceedings) to please all parties, we believe that the prescribed procedures will enhance the probability of accomplishing our goal of expediting divisions of revenue proceedings while at the same time according to the participants in such proceedings, procedural due process. These prescribed procedures are not to be regarded as the last word on the subject and the conclusions here announced do not foreclose future consideration of alternative suggestions.[2]

The Chicago and North Western Transportation Company (C&NW) believes that the only way in which expeditious handling might be achieved in a major interregional divisions case is for the Commission to assign, on a full-time basis immediately upon the filing of a notice of intent, a senior Administrative Law Judge who is knowledgeable in cost finding and experienced in presiding over complex cases with a firm hand. Further, C&NW and the mountain Pacific railroads suggest that an Administrative Law Judge be empowered to make all necessary discovery rulings. Mountain Pacific railroads recommend that an Administrative Law Judge be present during any depositions and resolve any resulting disputes as they arise. On balance, it is our view that there is no reason for modification of paragraph (t) which states that "Unless otherwise ordered by the Commission, divisions cases will be handled under the modified procedure, and oral hearing, if any, will be held only for cross-examination." Furthermore, it has been our experience that a party receiving an adverse ruling from an Administrative Law Judge in a divisions proceeding usually appeals such a ruling. Nothing under these regulations or the Commission's General Rules of Practice precludes a party from appealing an adverse ruling received under modified procedure. Accordingly, we suspect that regardless of whether an Administrative Law Judge is assigned to preside over divisions of revenue cases, the Commission will be petitioned to make ultimate evidentiary rulings. The parties can be assured that the Commission itself will use all its available expertise to quickly resolve disputes as they arise and that dilatory tactics by any party will not be countenanced.

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[2] For example, the trustee of the property of Chicago, Rock Island and Pacific Railroad Company recommends that the rules and regulations be framed to effectively utilize facts and figures kept in ordinary course of business supplemented by data and terminology found in industry-accepted publications such as the Universal Machine Language Equipment Register. While we are unable to resolve this issue on the record before us, we are open to suggestions of this type at a later date.

The Commonwealth of Pennsylvania (Pennsylvania), the Southern Governors' Conference and the Southeastern Association of Regulatory Utility Commissioners (SGC-SEARUC) claim that the proposed rules fail to recognize the interests of the public, including both shippers and consumers, in the matter of joint-rate divisions. In their joint pleading SGC-SEARUC allege that fair and nondiscriminatory divisions are just as essential to rail shippers as they are to the railroads citing as support *New York* v. *United States*, 331 U.S. 284 (1947). These participants go on to state that divisions are no less important to shippers and consumers than the level of rates being divided. SGC-SEARUC claim that if the railroads of one territory are given preferential treatment in divisions at the expense of the railroads of another territory, then the latter railroads receive less compensation for the same service, with the following results: either the loss is made up from the shippers in that territory in the form of higher rates, or the railroads of that territory are less able to render high-quality, efficient service. These participants conclude that either way, the shipping public of the disadvantaged territory bears the economic brunt of any disadvantage and that under the proposed rules parties other than railroad common carriers are not granted the same rights as the carriers.

Pennsylvania maintains the proposed rules are deficient because they assume only a carrier would bring a complaint regarding divisions. In addition, it is claimed the rules do not provide for the situation where the Commission, on its own motion, institutes a divisions proceedings. Additionally, Pennsylvania suggests that there is nothing to bar a State or State agency from instituting a complaint over railroad divisions, even though the State or State agency is not a direct party to the joint rate. Pennsylvania and SGC-SEARUC recommend modification of the proposed rules to make it clear that representatives of any State or region have the right to intervene and participate fully in any Commission proceeding on an equal basis with other parties, and this right of participation must include the same right to receive copies of quarterly progress reports to be filed with the Commission, the same right to take discovery or to participate in the conduct of special studies, and the same right to participate in prehearing conference as well as in oral hearings, as the railroad parties.

Complaints with respect to divisions of revenue are normally filed with the Commission by the railroad carriers that participate in joint rates when these parties are unable to resolve disputes. While there is nothing in section 201 of the RRRRA to specifically preclude or inhibit a shipper or governmental body from instituting a complaint regarding joint rates, such disputes are "essentially private arguments involving individual railroads and their territorial associations."[3] Nevertheless, we recognize our obligation to insure full participation by all interested parties. As the National Industrial Traffic League notes at page 6 of its reply statement, "it is axiomatic that disputes between and among carriers over divisions of joint rates will not be permitted to work injury to the shipping public." As above stated, the shipping and consuming public should be afforded the opportunity to participate fully in divisions of revenue proceedings. However, they should be aware of the procedural difficulties incident to institution of a divisions complaint by a shipper or governmental entity,[4] especially where the railroad participants have no desire to change the *status quo*. Our rules have been clarified to encourage full participation in revenue divisions proceedings and to underscore our commitment to equitable, just, and reasonable divisions for the benefit of the shipping and consuming public as well as for the participating railroads.

Section 15(6)(a) of the act authorizes the Commission to institute on its own motion a divisions of revenue proceeding, but as several parties have noted the rules herein adopted have been designed for use in adversary proceedings. Should the Commission decide to initiate a divisions proceedings, special procedures will be promulgated at that time for use in this somewhat unique situation.[5]

The eastern railroads advocate that the rule requiring a 6-month negotiation period immediately prior to the filing of a notice of intent to file a complaint or the filing of a formal complaint should be eliminated from the proposed rules. They contend the RRRRA does not include a negotiation requirement and such a requirement can only delay rather than expedite the disposition of divisions disputes. The eastern roads maintain that by skillful negotiation, a party could exhaust the 6-month negotiation period even though it had no intention from the outset of reaching a negotiated settlement.

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[3] Senate Report (Commerce Committee) No. 94-499 at page 8, November 26, 1975.

[4] The party instituting a division complaint proceeding has the burden of proof and must comply with the regulations here adopted.

[5] If the Rail Public Counsel should file a complaint relating to divisions, that office will be accorded all rights of any other party and like any other party must comply with the rules here adopted.

We must stress our disagreement with the eastern roads over the necessity for this section. While the RRRRA did not specifically call for negotiation in divisions dispute cases, this requirement herein enacted through a formal rulemaking proceeding is in concert with the thrust and purpose of the RRRRA to encourage greater rate freedom and reduce regulation.

The Long Island Rail Road Company (LIRR) states that if this subsection is to be meaningful, there should be some compulsion on the parties to the divisional dispute to meet and conduct meaningful negotiations. LIRR recommends that this section be further amended by adding a provision permitting the complainant or prospective complainant to immediately serve and file a notice of intent to file a complaint and request a prehearing conference to establish the joint studies in accordance with appendix B of the original notice, if the other party or parties, within 30 days after receiving the request from complainant, refuse to set a date and hold meaningful negotiations in regard thereto. We find merit to this suggestion. The provisions of section 1109.5(a) allow for the voluntary resolution of divisions disputes. There is no need to burden the Commission or the parties in a division dispute until it is clear that the issues cannot be resolved on a voluntary basis; however, the observations of the eastern railroads and the LIRR regarding the potential for delay are incisive. For these reasons proposed section 1109.5(a) has been modified to provide for a waiver of the 6-month waiting period in the event that a party or parties fail to negotiate in good faith. This modification will provide relief to a prospective complainant in the event of dilatory conduct by a prospective defendant.

The southern territory railroads stress that our requiring the parties to submit a verified statement summarizing prefiling negotiations and specifying the areas where agreement could not be reached might chill settlement discussions and deter the parties from engaging in constructive negotiation. While it remains our opinion that we must be kept informed of the substance of negotiation discussions to ensure that meetings are held and conducted in good faith, it was not our intent, nor is it our desire, to stifle the parties from engaging in frank settlement talks. We concede that our proposed specification requirement might have the effect of chilling negotiations. For this reason we have modified section 1109.5(a) accordingly.

The eastern railroads complain that the requirement to file a complaint which specifies with exactness traffic rate and divisions data would be extremely difficult if not impossible to meet at the commencement of a proceeding. It is advanced that greater specificity is required at the "notice of intent" stage of a proceeding than in the complaint itself. The eastern railroads suggest that subparagraph (c) be restructured to provide for later modification of the description of involved traffic, rates, and divisions. The purpose of the notice of intent is to put potential defendants on notice as to the scope of the division complaint to be filed. We recognize that the exact description of the traffic involved may not be known at this stage of the proceeding. We feel, however, that a general disclosure of proposed relief sought is warranted. Accordingly, this subparagraph has been modified in our final regulations.

The concept embodied in section 15(6)(d) of the act, the "notice of intent to file a complaint," is new to the administrative process. This requirement attempts to insure the presentation of meaningful evidence in divisions of revenue complaint proceedings. The LIRR advocates establishment of an 18-month time limit for this period. We agree that such a time limit should be imposed on the "notice of intent" phase of the proceeding to help insure the good faith of a prospective complainant and to reduce burdening a prospective defendant with inordinate delay or preparation of evidence which may prove stale by the time the complaint is formally filed. As indicated in section 1109.5(e), the Commission will monitor reports filed by prospective complainants to ensure due diligence in the preparation of formal complaints. Absent a showing of due diligence we may enter an order dismissing the notice of intent to file a complaint.

Section 15(a) of the act as amended by section 201 of the RRRRA requires the Commission to give consideration to the following factors when resolving division disputes:

> (1) the efficiency with which the carriers concerned are operated;
>
> (2) the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property;
>
> (3) the importance to the public of the transportation services of such carriers;
>
> (4) whether any particular participating carrier is an originating, intermediate, or delivering line; and
>
> (5) any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less portion than another carrier of the joint rate, fare, or charge.

The SGC-SEARUC, Family Lines System,[6] southern territory railroads, and mountain Pacific railroads complain that the Commission has improperly ignored the need for evidence with respect to the relative efficiency with which the carriers involved are operated and the importance to the public of the transportation services of such carriers. The Commission recognizes that appendix B to our order and notice served April 13, 1976, was limited to guidelines for the development of evidence with respect to traffic studies, cost studies, and operating characteristics. We are aware that relative costs of service are not the only factors to be considered in determining just divisions. *United States* v. *Abilene & S. R. Co.*, 265 U.S. 274 (1924). In the above case the Supreme Court said:

> The Commission must consider, also, whether a particular carrier is an originating, intermediate or delivering line; the efficiency with which the several carriers are operated; the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property; the importance to the public of the transportation service of such carriers; and other facts, if any, which would, ordinarily, without regard to mileage haul, entitle one carrier to a greater or less proportion than another of the joint rate. 265 U.S. 274, 284 (1924).

Accordingly, the Guidelines for Preparation and Submission of Relevant Data by the Parties will be modified to provide for submission of evidence pertaining to the standards set forth in section 15(6)(a). SGC-SEARUC maintain that "it is the service being performed which, from the standpoint of the public, should take precedence in divisions—not what it costs to produce that service." While this Commission is aware of the overriding public interest in the resolution of divisions disputes, we cannot accept the proposition that service evidence necessarily takes precedence over cost evidence as SGC-SEARUC would have us do. As the Supreme Court held in *Abilene, supra,* many factors must be considered, weighed, and balanced in resolving divisions disputes.

Furthermore, these parties object to the requirement of section 1109.5(v)(1) which provides that any allegation of inefficiency must be pleaded affirmatively. SGC-SEARUC point out the matter of efficiency "is central to what a divisions case is all about." We recognize that section 556(d) of the Administration Procedure Act places the burden of proof on the proponent of a rule or order or an essential element thereof. For this reason the final regulations delete the objectionable standard.

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[6] Seaboard Coast Line Railroad Company, Louisville and Nashville Railroad Company, Clinchfield Railroad Company, and the Georgia Railroad.

The SGC-SEARUC and southern territory railroads contend that the proposed rules are inadequate in that while they would require full disclosure of all subsidization of passenger and commuter operations, they fail to require similar full disclosure of facts with respect to all other subsidies. It is alleged that the costs of subsidized services, and facilities and operations being revitalized with public funds should not be included in interterritorial service costs as a basis for division of joint rates. These participants maintain that traffic operations are an important factor to be considered in a divisions case, since the facilities and operations thus subsidized are, or may be, directly involved in the performance of interterritorial freight service.

The Commission recognizes subsidization of freight operations may have an impact on the incentives to efficiency on the part of the subsidized carrier, which may affect divisions of revenue disputes. Accordingly, the regulations here adopted require that in instances where facilities and/or operations, or services are subsidized, such facts and attendant circumstances should be disclosed.

The C&NW, eastern railroads, and Missouri-Kansas-Texas Railroad Company (MKT) object to the proposed rule contained in section 1109.5(n) which provides that "if it is determined that special studies should be conducted and a party fails to conduct such special study or studies, *prima facie* status will be accorded the special study conducted by the other party in the ensuing formal complaint proceeding." They argue that this rule is unfair and should be rejected. MKT argues that a party which does not believe a study to be necessary should not be penalized for its belief. Moreover, it is advanced that this presumption benefits those parties which can afford special studies and act to the detriment of those who cannot. We are faced with a dilemma: a special study may be needed to present probative data which would resolve or settle a crucial element of the divisions dispute; yet must we preclude ourselves from rendering a favorable decision to a party not participating in a special study but which produces probative evidence nevertheless. To answer the criticism raised concerning the status accorded special studies, we have modified section 1109.5(n) to provide that in the absence of valid evidence to the contrary, prima facie status will be accorded the special study conducted by the other party in the ensuing formal complaint proceeding.

The mountain Pacific railroads, the Southern Railway Company, and the southern territory railroads object to reliance on cost studies developed in accordance with Rail Form A. Mountain-Pacific advocates modification of the rules to make clear that the parties are not required to use Rail Form A, but instead are required to produce the best cost evidence obtainable as to the traffic at issue. On the other hand, other railroads including Chicago, Rock Island and Pacific Railroad Company and the eastern railroads defend various aspects of Rail Form A. The LIRR in its reply statement warns of the dangers in oversimplifying the evidentiary standards and advocates retention of detailed evidentiary requirements.

We are well aware of the shortcomings of Rail Form A. The mountain Pacific railroads in their reply statement correctly cite our reluctance to "encourage any form of rigidity or impose stagnation in the field of cost ascertainment." *Rules to Govern Assembling & Presenting Cost Evidence*, 337 I.C.C. 298 (1970). However, in that case, we went on to state:

> Nevertheless, parties to Commission proceedings may continue to rely on formula-based costs, as modified, so long as the method of allocating expenses and the variability factors utilized are appropriate for the carrier's services for which the costs are presented. [337 I.C.C. 298, 324 (1970).]

We also recognize the problems incident to rendering a divisions decision based on cost-formula evidence. See *Baltimore & Ohio R. Co.* v. *Aberdeen & Rockfish R. Co.*, 393 U.S. 87, 90-93 (1968). Furthermore, the southern territory railroads and mountain Pacific railroads note that proposed rule (1) provides that "The cost studies shall be developed in accordance with Rail Form A properly adjusted to reflect the characteristics of the traffic in issue *** in accordance with the guidelines specified in Appendix B hereto." In *Rules to Govern Assembling & Presenting Cost Evidence, supra,* we expressly declined to embrace Rail Form A or any other cost formula. In divisions proceedings, the Commission contemplates that adjustments to Rail Form A may be required and will be accepted. However, the nature of those adjustments might be so substantial that the use of an alternative methodology would be more appropriate.

In view of the pending issuance of regulations and procedures prescribing a uniform railroad cost and revenue accounting and reporting system as directed by section 307 of the RRRA, we find it inopportune to discuss substitute systems at this juncture.

Accordingly, our regulations are modified to provide that Rail Form A may be used, but that other methods of cost allocation are acceptable to the extent they portray more accurate and reliable cost data.

The eastern railroads and LIRR object to proposed section 1109.5(v)(4) which states "absent valid cost evidence to the contrary, origin and destination terminal costs of a joint-line through movement shall be deemed to be the same." Eastern railroads contend this would place an unfair burden on a complainant seeking to prove its terminal costs were higher than the defendant's since it would have the burden of proving the valid costs at points where traffic was originated or terminated by its opponent and would have no effective means of doing so unless territorial average costs were considered valid. LIRR contends the origin and destination terminal costs should be deemed to be at least equal to the system average terminal cost of the origin or destination carrier which handled the subject traffic. We agree. It appears, as these participants indicate, that our original ruling places an unfair burden on complainants in that the necessary evidence may not be available to prove what a defendant's terminal costs would be. Our final regulation pertaining to this issue has been modified accordingly.

Eastern railroads and Southern Railway Co. state that the wording in some portions of appendix B would appear to indicate that guidelines detailed therein are mandatory in all cases. They suggest revisions which would clearly indicate that these guidelines are in fact only suggested guidlines. It was never our intent to infer that all of the data detailed in the proposed guidelines of our notice would be required in every divisions proceeding. Obviously, no one list of evidentiary requirements would be applicable to all divisions cases, involving one, or several, or all commodities, interchanged between two carriers, all carriers in a territory or all carriers interterritorially. Accordingly, the final Guidelines for Preparation and Submission of Relevant Data by the Parties are hereby modified to clarify our intent.

Eastern railroads, Southern Railway Co., and southern territory railroads contend that the reference in the evidentiary guidelines to constant costs distributed on a ton and ton-mile basis, should be deleted. The parties refer to *Rules to Govern Assembling & Presenting Cost Evidence, supra,* wherein we held that the allocation of constant costs of particular services, for ratemaking purposes, should result in the assignment of an equitable portion of such expenses to the particular services, and no single method can be considered as universally acceptable to all transportation services.

Southern Railway also contends that the reference to fully allocated cost levels should be deleted. By definition constant costs are not allocable or assignable on a cost-of-service basis, nor traceable to particular units of output, for otherwise they would be variable and not constant. Constant costs are relevant solely with respect to the issue of revenue need and are irrelevant in determining the issue of relative costs in divisions cases.

In view of our comments in the above-noted proceeding, it is inappropriate to require allocation of constant costs solely on the ton and ton-mile basis. However, even though constant costs may be appropriately considered in the context of revenue need, it would be improper to delete references to fully allocated and constant costs. Revenue need is also a factor to be considered in divisions proceedings.

The Family Lines System argues that a carrier should not be required to participate in the preparation of a joint traffic and cost study. This participant complains that it is not obligated to present evidence which could be detrimental to its position. The System worries about the scope of access to the files, records, and traffic data of every other party involved in the study.

In our opinion, the Family Lines System's position is unfounded. Sections 12(1) and 12(2) of the Interstate Commerce Commission Act authorize the establishment of this type of requirement. Without mandating joint studies, it would be extremely difficult to develop the requisite evidentiary record to reach a just decision.

Several parties including both the southern territory railroads and the eastern railroads object to the discovery limitations imposed by section 1109.5(j). The eastern rail group contends that the RRRRA in no way limits the right of discovery in divisions proceedings and there is no valid reason presented to limit this right. The southern territory railroads aver that these undue limits to the right of discovery offend basic notions of fairness in the conduct of litigation.

The southern roads advocate that defendants be made aware of any and all evidence to be relied upon by complainants well before the formal complaint and the evidence in support are filed. According to these participants the 30-day period for filing defendant's evidence is inadequate; therefore, the Southern roads advocate modification of the rules to provide for a 6-month period for the filing of such evidence.

We must ensure that all parties in a divisions case have the right to effectively respond to an opposing party's evidence while at the same time assuring that this right is not abused. We disagree with the southern territory railroads that our requirement of allowing only 30 days after the filing of a formal complaint to submit rebuttal evidence places an undue burden on defendants. We recognize that certain rare situations may occur where more time is required by a defendant to prepare an adequate reply. For this reason we have provided that relief may be granted defending carriers upon a showing of good cause.

In formulating discovery regulations we have to carefully balance our obligations to expeditiously handle divisions of revenue cases with our responsibility to adhere to basic concepts of procedural due process. *General Rules of Practice*, 346 I.C.C. 603, 619 (1974). A rule of general application allowing a defendant a 6-month period for filing evidence would unduly delay all divisions cases. However, we recognize that in certain cases more time will be required by a defendant to prepare an adequate reply. For this reason we have provided that relief, including the right of discovery, may be granted defending carriers upon a showing a good cause. The unrestricted use of discovery could be used to defeat the intended purpose of the new legislation, the expeditious handling of divisions of revenue proceedings. Accordingly, our final regulations pertaining to discovery have been modified to provide for discovery relief upon the requirement of a petition and a demonstration of good cause.

MKT, eastern railroads and LIRR contend the requirement that traffic studies are to be developed for the most current calendar year available may be detrimental to the presentation of a proper and timely record to the Commission. These participants point out that the most recent year may not be representative, or that the data to be collected requires a prospective study, and that the parties could agree on an alternative period which might be less than a 12-month period.

We agree. As previously stated, the guidelines contained in appendix B of our order served April 13, 1976, were just that, guidelines. Our final regulations contained in appendix D hereto provide for joint study of issue traffic for the most current calendar year available or another period agreed upon by the parties as representative. Our revision also reflects the eastern railroads' suggested inclusion of "or group of carriers." This sentence would account for interterritorial divisions cases, as well as those of a narrower scope, including cases between a single complainant and a single defendant on a single commodity.

The mountain Pacific railroads assert that our proposed regulations were tailored to north-south interterritorial divisions situations and are not sufficiently flexible to other types of divisions proceedings including those involving the mountain Pacific territory where it is alleged that due to geographical or climactic conditions and the composition of traffic, rail service is unlike anywhere else in the country.

We are aware of both the advantages and disadvantages faced by the mountain Pacific railroads in the course of their operations. The modifications made to our Suggested Guidelines for Preparation and Submission of Relevant Data by the Parties reflect our awareness of the potential for widely differing types of division proceedings.

Southern territory railroads in their initial statement and LIRR in its reply statement have presented various sample study forms which they recommend for use in collecting traffic sample data. It would appear that these forms may be appropriate for use in some cases, but not in others. Consequently, these forms will not be incorporated in the final regulations. Also, several of the parties have made suggestions in their initial statements and replies which clarify our evidentiary guidelines and eliminate verbiage. Where this was the effect of the parties proposals we have embodied their revisions.

SUMMARY CONCLUSIONS AND FINDINGS

Upon consideration of the matters raised by the participants in their initial statements and the replies thereto, we are convinced, for the reasons stated, that the above-described modifications and amendments to our proposed regulations are warranted. The prescribed regulations, as modified and amended, are set forth in appendix D. Certain other changes have not been discussed herein since they are either merely for clarification or stem directly from changes which have been specifically considered.

We believe that the prescribed procedures will enhance the probability of accomplishing our goals of shortening the time necessary to handle divisions of revenue cases, achieving greater uniformity and reliability of data submitted, and providing adequate notice to carriers and the public of the minimum evidence we deem necessary to render a decision in furtherance of the public interest.

We find that in order to ensure that parties to divisions of revenue proceedings before this Commission may participate more fully and effectively in the administrative decisionmaking process, adoption of the rules specified in the order attached hereto is required. We further find that Part 1109 of Subchapter B, Chapter X of Title 49 of the Code of Federal Regulations requires modification as set forth in the order attached hereto. We further find that such rules and regulations are reasonable and necessary and should be prescribed. We further find that this decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

An appropriate order will be entered.

COMMISSIONER CORBER did not participate.

APPENDIX A

Amended section 15(6) of the Interstate Commerce Act

Sec. 15(6)(a) Whenever, after full hearing upon complaint or upon its own initiative, the Commission is of opinion that the divisions of joint rates, fares, or charges, applicable to the transportation of passengers or property, are or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the carriers parties thereto (whether agreed upon by such carriers, or any of them, or otherwise established), the Commission shall by order prescribe the just, reasonable, and equitable divisions thereof [sic] to be received by the several carriers, and in cases where the joint rate, fare, or charge was established pursuant to a finding or order of the Commission and the divisions thereof are found by it to have been unjust, unreasonable, or inequitable, or unduly preferential or prejudicial, the Commission may also by order determine what (for the period subsequent to the filing of the complaint or petition or the making of the order of investigation) would have been the just, reasonable, and equitable divisions thereof to be received by the several carriers, and require adjustment to be made in accordance therewith. In so prescribing and determining the divisions of joint rates, fares, and charges, the Commission shall give due consideration, among other things, to the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation, and the importance to the public of the transportation services of such carriers; and also whether any particular participating carrier is an originating, intermediate, or delivering line, and any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare, or charge.

(b) Notwithstanding any other provision of law, the Commission shall, within 180 days after the date of enactment of this subdivision, establish, by rule, standards and procedures for the conduct of proceedings for the adjustment of divisions of joint rates or fares (whether prescribed by the Commission or otherwise) in accordance with the provisions of this paragraph. The Commission shall issue a final order in all such proceedings within 270 days after the submission to the Commission of a case. If the Commission is unable to issue such a final order within such time, it shall issue a report to the Congress setting forth the reasons for such inability.

(c) All evidentiary proceedings conducted pursuant to this paragraph shall be completed, in a case brought upon a complaint, within 1 year following the filing of the complaint, or, in a case brought upon the Commission's initiative, within 2 years following the commencement of such proceeding, unless the Commission finds that such a proceeding must be extended to permit a fair and expeditious completion of the proceeding. If the Commission is unable to meet any such time requirement, it shall issue a report to the Congress setting forth the reasons for such inability.

(d) Whenever a proceeding for the adjustment of divisions of joint rates or fares (whether prescribed by the Commission or otherwise established) is commenced by the filing of a complaint with the Commission, the complaining carrier or carriers shall (i) attach thereto all of the evidence in support of their position, and (ii) during the course of such proceeding, file only rebuttal or reply evidence unless otherwise directed by order of the Commission. Upon receipt of a notice of intent to file a complaint pursuant to this paragraph, the Commission shall accord, to the party filing such notice, the same right to discovery that would be accorded to a party filing a complaint pursuant to this paragraph.

APPENDIX B

Views of interested parties

INITIAL STATEMENTS

Missouri-Kansas-Texas Railroad (MKT) opposes as inequitable the provision according prima facie status to special studies of one party where, after a determination by the Commission that special studies should be conducted, the other party fails to conduct such study(ies) (rule (n)). MKT asserts that under the proposed rule the party advocating the special study would have the benefit of the presumption while the other party, not desiring to or not financially able to participate in the study, would be severely penalized; and that unless a party has agreed to a particular study it should not so summarily be foreclosed from supporting its position. MKT also recommends that the proposed guidelines be amended to permit the parties, where they so agree, to utilize a period of less than a calendar year as a basis for their joint traffic studies.

The National Industrial Traffic League (League) calls attention to shipper interest in divisions as they affect the level of rates and the matter of service, and states that provisions of Public Law 94-210 (RRRR Act) relating to divisions (section 201) must be considered with all other provisions under Title II (rates) and also with all provisions under Title III (regulatory reform). No comment is offered with respect to any of the proposed rules and procedures.

Consolidated Rail Corporation (Conrail) concurs in the views of the eastern railroads, and urges adoption of final rules that will both speed up and simplify the divisions adjustment process as mandated by Congress. Excerpts are provided from the Senate Report on S.2718 (RRRR Act) indicating that previous application of the section 15(6) standards had produced delay and operated to the advantage of those carriers concerned with maintaining the *status quo*. Conrail opposes as unnecessarily detailed and expensive the suggested guidelines which become mandatory under proposed rule (q).

The Southern Governors' Conference (SGC) and *Southeastern Association of Regulatory Commissioners* (SEARUC) maintain that divisions are just as important to shippers and consumers as are the levels of rates being divided, but that the proposed rules appear to treat divisions disputes as matters of merely private interest. They urge modification of the rules to specifically provide representatives of a State or region the right to intervene and fully participate on an equal basis with other parties to divisions proceedings. They particularly want notices of intent to be filed with sufficient copies to permit service upon the Governor and public service commission of every State served by any railroad whose revenues might be adversely affected by the divisions sought. Stressing the centrality of efficiency to the proper disposition of divisions proceedings, these interests fault the proposed rules for failing to provide for submission of evidence of efficiency and for requiring instead that allegations of inefficiency be pleaded affirmatively (rule (v)(1)), thereby shifting from the complainant to defendant—or others who oppose the complaint—the burden of pleading and proving an essential element of the complaint. They contend that such an approach is contrary to section 15(6) and violates the Administrative Procedure Act (5 U.S.C. sec. 556(d)) which requires that the proponent of a rule or order has the burden of proof. These parties further contend that the suggested guidelines are inadequate and unlawful to the extent that they fail to require complainants to make full disclosure of all their subsidized operations (not just passenger and commuter operations), and assert that the huge State and Federal subsidiaries paid for the freight traffic operations of the northern lines should not be included in studies to support an increase in divisions because they are costs to the public rather than to the railroad.

Farmland Industries, Inc., believes that present divisions agreements reflect the views of those carriers in a position to drive the best bargain and contribute to the financial instability of the other carriers. A separate proceeding is urged to investigate the entire divisions structure, particularly with respect to its effect on "rich versus poor railroads."

The Chicago and North Western Transportation Company (C&NW) is concerned that delay tactics previously pursued after a divisions complaint had been filed will merely be transferred to a notice of intent phase of the proceeding. It stresses the need for divisions proceedings to be presided over with a firm hand by a highly qualified senior Administrative Law Judge. C&NW, like MKT, opposes as inequitable, the proposal to accord prima facie status to special studies made by one party where the other party fails to conduct such studies after a determination that they should be made (rule (n)). C&NW also suggests minor revisions designed to make the guidelines more flexible.

Eastern railroads (ER) comment separately on the proposed rules and on the suggested guidelines for traffic and cost studies.

They specifically oppose rule (a) which requires a prospective complainant to have willingly sought negotiation of the divisions in issue within 6 months of filing the notice of intent, asserting that it constitutes a built-in vehicle for delay available to potential defendants, that it is not needed to encourage settlement negotiations, and that the cost in manpower and money to prosecute a divisions case provides ample incentive for that purpose. They would revise the required content of notice (rule (c)) so as to make it less formal and exacting; and would revise rule (e) so as to permit, rather than require, the Commission to dismiss a notice of intent for lack of due diligence. No comment is made as to proposed rules (b), (d), (f), (g), (h), and (i) which also relate to the notice of intent.

The eastern rail group would completely rewrite the proposed rule relative to discovery (rule (j)) so as to accord all parties to divisions cases essentially the same rights as normally provided in other types of cases; they contend that the RRRR Act in no way limits the right of discovery in divisions cases and that there is no reason for any limitation of the right. They recommend that rule (k) relative to joint traffic studies be revised so as to provide that the Commission may order joint traffic studies to be made by all carriers deriving revenues from the involved traffic, and offer clarifying language for the rule dealing with cost studies (rule (l)). The rule dealing with special studies (rule (m)) would be revised so as to: (1) change the time for requesting studies from 30 days from commencement of the cost study to 90 days from commencement of the joint traffic study and thus minimize delay; (2) provide that requests for studies set forth the proposed methodology so that they may be more effectively analyzed; and (3) require that any response to the request for special studies be made within 15 days in order to preclude the possibility of delay. The rule with respect to prehearing conferences (rule (n)) would be revised to assure that all disputes are resolved under the same procedure, and its provisions with respect to "prima facie status" would be deleted to avoid ambiguity and the possibility of misinterpretation.

No comment is offered with respect to procedures relative to filing of the complaint and answer (rules (o) and (p)). However, the proposal to dismiss a complaint not preceded by a notice of intent for failure to follow the suggested guidelines (rule (9)), would be deleted. Eastern railroads contend that rule (q) is an apparent attempt to coerce potential complainants into using the "notice of intent" procedure which in some cases could be a waste of time, that it is beyond the provisions of the RRRR Act, and that dismissal of a complaint without full hearing and determination of its merits would constitute a denial of substantive legal rights.

Rules (r) and (s) dealing with rebuttal evidence would be expanded by incorporating provisions set forth at page 8 of the Notice of Proposed Rulemaking (apparently omitted inadvertently). Rule (t), which calls for handling divisions cases under the modified procedure, would be revised to set forth the specific procedure here provided and make unnecessary any provision for handling under the modified procedure. The proposal to limit admission of evidence following rebuttal to reply evidence (rule (u)) would be amended to provide for the filing of briefs as prescribed by the Commission, bringing it into harmony with the Notice of Proposed Rulemaking, which states at page 8 that a briefing schedule will be announced in individual proceedings.

Eastern railroads strongly oppose evidentiary presumptions (3) and (4) set forth in rule (v). They state that it would be highly inappropriate to apply any presumption with respect to "border point" traffic because the matter of north-south border point traffic is still being litigated before the Commission and the courts. They further state that the presumption that terminal costs are the same at origin and destination would impose "an impossible" burden on a complainant seeking to show its terminal costs to be higher than defendant's. They explain that in order to meet that burden it would be necessary for the complainant to prove the "valid" costs at points where traffic was originated and terminated by the defendant but with no effective means to do so unless territorial costs were considered valid. Accordingly, they urge deletion of evidentiary presumption (3) and revision of evidentiary presumption (4) so as to assume the validity of territorial average terminal costs in the absence of other cost evidence.

Eastern carriers call attention to the ambiguity between the title "Suggested Guidelines" and other language appearing to make joint studies mandatory, and urge correction of this situation by the insertion of language in the "General" paragraph to make clear that what follows does constitute "guidelines"—and for individual, as well as for joint, studies.

Concerning the "Traffic Study" paragraphs of the guidelines, the eastern lines contend that the parties should be permitted to use a study period other than the most current calendar year providing they both so agree; that there is a need to expand the proposed rules to include rules for developing statistical samples (including sample sizes) which may vary as to type of divisions case, and to that end a separate rulemaking proceeding should be instituted; that traffic characteristics should be based upon information generally available from interline abstracts or waybills, in which regard clarifying modifications are offered in items 4 and 5 relative to short-line mileages and types of traffic, and a new item is recommended (item 8) to include accessorial services information which is generally available from abstract data; that the Commission should adopt a rule dealing with transit traffic[1] similar to the "predominant tonnage rule" used by the Southern lines in docket No. 29985 (*Official-Southern Divisions*, 325 I.C.C. 1 (1965)) to be used where simpler and more expeditious procedures are not agreed to by the parties (the "predominant tonnage" rule provides that where traffic study shipments have a number of related prior movements into transit point origins, the prior movements are treated as if they had all originated at the point where the greater or greatest portion of the tonnage originated)[2]; that in developing operating characteristics for "each sample carload" tracing studies should not be mandatory as underlying records may not be available, other easier methods may be used, it may be unnecessary (where there are few carriers and/or a narrowly defined movement of traffic or commodities), and new cost techniques may be developed to replace tracing studies; and that the listing of operating characteristics should be rewritten to include identification of intra-train—as well as intertrain—switching points, to eliminate reference to "sample traffic cars" and other language implying the necessity of a tracing study, and to eliminate the word "segment," the intended meaning of which is obscure.

Concerning the "Cost Study" paragraph the eastern railroads would eliminate the absolute requirement that cost studies and traffic studies be based on the identical time period, permitting the traffic study to be for a period shorter than 1 year, eliminate the requirement that service units must be obtained for "each sample carload", and permit greater flexibility in aggregating costs by types of traffic; would strike the requirement that constant costs be distributed on a ton and ton-mile basis; and would revise the enumeration of various cost elements to make clear that tracing studies and on-ground switching studies, among other things, are not required.

Finally, data with respect to "Revenue Need Evidence" should be limited to class I railroads, according to the eastern rail group.

The Long Island Rail Road Company (LIRR) would modify rule (a) to provide that if the prospective defendant fails within 30 days to respond to prospective complainant's request for meaningful negotiations, the prospective complainant may immediately file a notice of intent and request a prehearing conference to establish the joint studies necessary under the guidelines; would revise rule (d) to spell out that the complaint may not be filed more than 18 months after filing of the notice of intent unless the Commission extends the time for good cause shown and would modify rule (m) to provide that a party seeking special studies has the burden of showing that traffic and cost studies will not permit a proper determination of the case and that the special studies will overcome the inadequacies and are necessary for a proper determination of the issues. Long Island strongly opposes as extremely unfair to a complaining carrier seeking relief in the face of defendants' dilatory and obfuscatory tactics, the presumption that terminal costs of joint-line movements are the same at origin and destination, and would reword the presumption to provide that origin and destination costs will be deemed to be "at least equal to the system average terminal costs of the origin or destination carrier which handled the subject traffic" (rule (v)(4)).

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[1] Text of a proposed rule on transit traffic is provided in the eastern railroads presentation.

[2] The eastern railroads attach a statement titled "Transit Traffic Analysis in Docket No. 35585."

With respect to the suggested guidelines, Long Island contends that the traffic study should be developed for the most current 12-month period available which need not be precisely coincidental with the period for the cost study, and cautions that by restricting the studies to a calendar-year basis the Commission runs the risk of having to make a determination upon stale figures.

Commonwealth of Pennsylvania (Pennsylvania) contends that the proposed rules are deficient because they assume that only a carrier would bring a complaint, and make no provision for the Commission to institute a divisions proceeding on its own motion. Pennsylvania also asserts that the rules require too much detail for a noncarrier complaint; that section 15(6)(d) refers to carrier complainants and that the Commission should issue amended regulations which reflect the noncarrier complainant.

The Family Lines System (Family Lines) asserts that the proposed rules depart from the Commission's historic recognition that the burden of proof under section 15(6) is on the carrier proposing to change existing divisions, contends that a carrier should not be prejudiced by refusing to participate and cooperate in a joint traffic study, and characterizes as "incomprehensible" a requirement that records and files be shared with a competitive line and as "frightening" the potential damage that could result from such cooperation. These roads are of the view that the suggested guidelines call for undue consideration of cost, failing to mention such factors as efficiency and public importance of the transportation services that are specifically mentioned in section 15(6)(d). They also object to the presumption that the same divisional basis should apply uniformly on all "border point" traffic, noting that classes of traffic, rate levels, and routing frequently differ at various border points.

Southern Railway Co. (Southern) recommends that the rules be amended to provide for waiver of the suggested guidelines (or the establishment of more simplified guidelines) in other than general interterritorial disputes, so that parties in more limited divisions controversies need not be burdened with requirements to prepare evidence not necessary for the prosecution or defense of complaints. This carrier also recommends that rule (j) be amended to preserve the right of discovery for the preparation of complainant's rely evidence, explaining that the provision for examination of underlying workpapers (rule (r)) may prove inadequate for that purpose. Additionally, the Southern would delete any reference in the guidelines to "fully allocated cost levels" and the requirement that constant costs be distributed on a ton and ton-mile basis. They recognize that the allocation of constant costs may become relevant in divisions disputes, but contend that because of differing contentions as to revenue needs, the appropriate method for distributing costs should be determined on the basis of the evidence submitted on a case-by-case basis, and should not be prescribed by regulation.

The southern territory railroads (STR) assert that the proposed rulemaking suffers from serious substantive and procedural deficiencies traceable to proceedings in which the northern lines attacked the equal-factor basis (same factors for each territory for same length of haul) of divisions prescribed by the Commission in *Official-Southern Divisions*, 287 I.C.C. 497 (1953). They provide summaries of two related proceedings—docket No. 29885 (Official Southern Divisions, 325 I.C.C. 1 (1965) and docket No. 35585 (Akron, Canton & Youngstown R. Co. v. Aberdeen & Rockfish R. Co.)—which indicate that following enactment of the Regional Rail

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Reorganization Act of 1973 the northern lines who were seeking divisions related to cost of service, suspended work on joint studies and that thereafter the Commission dismissed the complaint in its order of 1974. The Commission found that the value of the previously conducted joint studies would be destroyed by reorganization of certain northern railroads, but did recognize such studies to be "essential."

The southern roads generally contend that the proposed rules and suggested guidelines overemphasize the development of cost and revenue need evidence and fail to require the development by complainant of evidence on relative efficiency and public importance as called for by section 15(6). Because the only reference in the rules to relative efficiency is the requirement of rule (v)(1) that "any allegation of inefficiency must be pleaded affirmatively," they fear that the Commission intends to require the defendant to not only plead but also prove any allegation concerning complainant's inefficiency; they state that such a construction would shift the burden with respect to an essential element of complainant's case—relative efficiency and would constitute a violation of both section 15(6) and the Administrative Procedure Act (5 U.S.C. sec. 556(d)). They maintain that under the provisions of section 15(6) relative costs may not properly be used as a basis for divisions unless they are the result of efficient operations and that in order to satisfy its burden complainant is obliged to develop evidence with respect to each factor at the same time and on the same basis—the only way in which costs resulting from inefficiency can be identified, isolated and excluded as a basis for dividing joint rates. They recommend that the guidelines and rules be amended by inserting the word "efficient" in each place the development of cost is addressed in order to make clear that the complainant has the burden to introduce and prove efficient costs; and that guidelines be established for the development of evidence on relative efficiency, with appropriate amendments in the rules concerning the scope and duration of discovery to insure development of an adequate record.[1] They stress the need for the Commission to address the question of developing evidence on relative efficiency in order to avoid imposing upon the southern railroads a direct rehabilitation subsidy for the inefficient northern railroads in the form of improperly inflated divisions. They state that even with the help of the Regional Rail Reorganization Act of 1973 it will be several years before Conrail can implement significant operating efficiencies and until then its costs will continue to be doubly inflated by both the effects of past efficiencies and the necessary expenditures—mostly financed by the public treasury—to overcome those effects. Apart from the factor of relative efficiency the southern roads call attention to the massive restructuring of the northern lines as an indication of the public importance of the services of the carriers.

The southern carriers also maintain that guidelines and rules relative to traffic, cost and revenue needs evidence fail to require adjustments for crew wages, delays, and other elements of cost that the Commission previously found to be necessary and proper.[4] They also note a conflict between provisions in the guidelines and rule (1) as to whether Rail Form A "may" or "shall" be used in developing costs, and recommend removal of the ambiguity by providing that Rail Form A may be used but that other methods of cost allocation can also be used to the extent that more accurate or reliable cost data results. In support of this position the southern railroads state that Form A costs do not reflect the efficient cost of moving the traffic because they are predicated on historical data recorded on an as incurred basis, and further state that the RRRRA requirement for a new uniform cost and revenue account system casts some doubt on the continuing viability of Rail Form A. They assert that guidelines with respect to revenue needs evidence are deficient in failing to require disclosure of subsidies for freight operations such as those paid Conrail to insure continued operation over low-density lines.

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[1] The southern railroads attach to their presentation the draft of a proposed rule providing, in effect, that the notice of intent shall indicate the nature of intended evidence on efficiency and public importance and whether joint studies are contemplated; that within 30 days from filing of the notice the parties are to separately state areas of disagreement or elaboration as to traffic study data, and if agreement cannot be reached within 15 days the matter will be referred to the Commission for resolution; and while the traffic study is being conducted the parties shall seek to agree upon data and methodology relative to efficiency and public importance, notifying the Commission within 30 days from commencement of the cost study of any agreement relative to joint studies, the Commission to resolve conflicts as to the nature of joint studies and establish time frame for their completion.

The southern lines specifically object to proposed rules (p) and (r) which provides that where complainant pursues the notice of intent procedure defendant has 30 days after filing of the formal complaint in which to file its answer and all rebuttal evidence. They say that such a limited time provision would prejudice the right of adverse parties to prepare their defense, unduly limit the light of discovery and offend basic notions of fairness, particularly in situations where complainant's evidence extends beyond matters specifically dealt with in the guidelines and rules. They contend that defendant is entitled to notice of any and all evidence to be relied upon by complainant at the earliest practicable time, and in any event no later than 30 days after commencement of cost studies; and that the rules should be modified to allow defendants 6 months for the filing of their evidence.

Mountain Pacific railroads (MPR) contend that the proposed rules, being tailored to north-south interterritorial traffic, are not sufficiently flexible to accommodate other kinds of traffic, particularly that of mountain-pacific territory where, due to geographical or climatic conditions and the character of the traffic, rail service is unlike that anywhere else in the country.

Commenting on the suggested guidelines they state that amendments are necessary to provide for the submission by any complainant of "Evidence as to Efficiency"[5] and "Evidence as to Public Importance."[6] Additionally, they would expand data set forth under "Traffic Study" to include such other traffic and operating characteristics and information as the parties or the Commission may determine in any particular case; and expand data set forth under "Cost Study" to include maintenance of way, car repair, fuel, crew wages, density of traffic, and such other cost data as the parties or

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[4] The southern railroads provide forms used in docket No. 35585 to show each element of data which at a minimum should be collected in any future interterritorial north-south divisions proceeding.

[5] Recommended evidence of efficiency would include data with respect to existing duplication of facilities, slow orders, speed of movements, plans for track abandonment, plans for rehabilitation or modernization of yards and other facilities, deferred maintenance, accidents, equipment utilization. bad-order ratio for cars, lines and facilities maintained because of governmental subsidies and the amounts of such subsidies, and any other relevant data.

[6] Recommended evidence of public importance would include the proportion of traffic at issue to total traffic, availability of alternative transportation modes for issues traffic, impact of service deterioration or of increased rates with respect to issue traffic on economies of affected regions, extent to which facilities used in connection with the issue traffic are or have been subsidized by State or local governments, and any other relevant data.

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Commission may determine in a particular case. They assert that conflicting provisions of the suggested guidelines and the proposed rules as to whether Rail Form A "may" or "shall" be used, should be resolved by modifying the rules to provide that the railroads must produce the best cost evidence obtainable as to the traffic at issue. In that regard, MPR states that while Rail Form A may be appropriate in some situations, territorial average costs often bear little resemblance to the cost of interterritorial traffic to the west coast; hence it makes no sense to require that Form A be used, especially since Congress in the RRRR Act has directed the development of new accounting methods.

Commenting on the proposed rules these western roads state that it is fundamentally unfair to place on defendants the burden of proving not only their own relative efficiency, but also the complainants' relative inefficiency (rule (v)(1); and that the rules violate section 15(6) and the Administrative Procedure Act (54 U.S.C. sec. 556(d)) by failing to require complainants to produce evidence as to efficiency and public importance as part of their case-in-chief. They contend, in view of the widely recognized conditions of inefficiency and waste that have driven-northeastern lines into bankruptcy, that any group of carrier complainants serving the Northeast should be required to prove "the extent of their inefficiency and extent of adverse impact each inefficiency has had and is having on their costs and revenue needs" so that the Commission may be able to determine whether the complaint is more than a request for subsidization of continuing inefficiency in the form of increased divisions. They also claim that proposed rule (j), by limiting discovery to "the type of evidence referred to in the suggested guidelines (they refer only to traffic, cost and revenue needs evidence) deprives defendants of the right to discovery with respect to complainants' inefficiency, and constitutes a denial of due process of law as well as a violation of section 15(6) and the Administrative Procedure Act. To rectify these deficiencies it is recommended: that the notice of intent specify with exactness the justification under each of the section 15(6) standards for the proposed basis of divisions, and in addition, indicate the environmental impact (rule (c)); that the rule on discovery provide for use of that tool for assembling all evidence relevant to each of the section 15(6) standards (rule (j)); and that the subparagraph requiring defendants to affirmatively plead the inefficiency of complainants be deleted (rule (v)(1)).

Mountain Pacific roads consider to be totally inadequate the procedure which requires defendants to rebut complainants' evidence within 30 days from the time much of it is first made available to them, and at the same time restricts defendants' right of discovery. However, rather than recommend extension of the 30-day period (between filing of the case-in-chief and rebuttal evidence), these carriers suggest that complainants be required to make their evidence available to defendants during the notice-of-intent phase, sufficiently in advance of filing the complaint to afford defendants adequate opportunity to take discovery and prepare their rebuttal evidence. In order to guarantee parties an adequate opportunity to prepare and present their evidence and to assist the Commission in efficient utilization of the time allotted to it by section 15(6), as amended, they recommend the following modifications in rules: add a new rule requiring complainants to disclose to all parties at or before completion of the joint traffic study all evidence (except cost) and affording defendants ample opportunity to audit or test check and take discovery; modify rule (n) to provide for prehearing conferences to resolve the validity of discovery requests and provide for close of discovery; modify rule (o) to provide that after the close of discovery complainants are to file their case-in-chief; modify rule (r) to provide that failure to conform to the rules or guidelines shall result in an order dismissing the complaint; add a new rule to provide that after all evidentiary proceedings are completed the record shall be closed, briefs filed, an initial decision made, exceptions and replies to exceptions filed, and then the case submitted to the Commission (this modifications recognizes that the 270-day period within which the Commission must issue its final order under section 15(6)(b) begins to run from the time the case is submitted to the Commission itself, and not from the time "all evidentiary proceedings" are completed as the proposed rules appear to suggest); and add a provision in the rules to provide that they may be waived by the Commission in any case involving a single commodity, or fewer than four railroads, or intraterritorial traffic.

William M. Gibbons, trustee of the property of Chicago Rock Island and Pacific Railroad Company, debtor (Rock Island), stresses the need, in framing rules, to contemplate the use of readily available facts and figures in books and records kept in the ordinary course of business. Commenting generally on the suggested guidelines, Rock Island suggests that since the use of sampling techniques and special studies has caused delay, since most cars have computer capability to recapture traffic and equipment utilization data, and since divisions disputes involve substantial blocks of traffic, Rail Form A costs should be considered prima facie cost evidence. In regard to the traffic study, Rock Island suggests that car and trailer data be such "as found in the Universal Machine Language Equipment Register" which is readily available to all carriers, that "billed" rather than "actual" weight be used, that since locomotive maintenance records do not indicate the horsepower of each locomotive such information should not be required, and that various language changes of a minor nature should be made. Somewhat similar suggestions are advanced with respect to cost studies. In that connection Rock Island says it is imperative that the Commission accept switching costs for individual railroads developed on a system basis, reiterating its strong support for the use of Rail Form A. The Commission is cautioned against demands for detailed switching studies which require a magnitude of work that is beyond the capacity of many railroads—particularly those having the greatest revenue need—to complete in an expeditious manner and at a reasonable cost. Because car ownership costs will be understated for those carriers who, due to their greater revenue need have found it necessary to limit car ownership and maintenance, Rock Island suggests that car ownership costs in divisions cases be based upon the average car ownership costs of those carriers that have maintained their car fleets at adequate levels and acceptable standards of bad-order ratio, or in the alternative, upon regional costs.

REPLY STATEMENTS

Southern territory railroads assert that Conrail's opposition to the evidentiary requirements and procedures described in the guidelines is an effort to avoid the development of substantial record evidence and that adoption of Conrail's recommendations would only prolong divisions controversies. They state that the silence of Conrail and the eastern railroads[7] on the failure of the proposed procedures to provide for evidence on relative efficiency and public importance could mislead the Commission into an unlawful and unsound position as to burden of proof. They consider to be "irresponsible" the position of eastern railroads that tracing studies should not be mandatory and that operating characteristics data need not be obtained for each sample carload, noting that the Commission in docket No. 35585 recognized the need for such studies; they add that the need for them is even more imperative for the future, particularly in view of the overriding questions of efficiency and public importance arising from Conrail's dominant role in the North. Responding to eastern railroad's recommendation that a separate proceeding be instituted to establish rules for developing statistical samples, the southern lines stress that sample size must be resolved on a case-by-case basis, depending on the number of carriers, types of commodities, origins and destinations, routes of movement and methods of analysis; they suggest that rule (n), dealing with prehearing conferences, might be expanded to include the assignment of an Administrative Law Judge at the outset of proceedings to pass on such matters as sample size. This carrier group further contends that adoption of various suggestions of the eastern roads relative to the development of cost evidence* would render meaningless the development of terminal costs, a significant cost factor; they say this is another effort to permit the northern lines to hide behind regional averages and disable the Commission and other parties from developing evidence of actual efficient costs. Disagreeing with eastern railroads' request for a "predominant tonnage" rule for transit traffic, they state that there is no reason to treat transit traffic any differently than any other traffic from the standpoint of required traffic, cost, and operating characteristics data. Finally, the southern railroads assert that the unfairness of the proposed 30 day period for defendant to prepare and file rebuttal evidence would only be compounded by the suggestion of eastern lines that evidence in support of a cross-complaint should be filed within 30 days of complainant's evidence, observing that evidence in support of a cross-complaint may differ markedly from that offered in rebuttal.

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[7] The southern railroads refer to the eastern railroads as "northern railroads."

Mountain-Pacific railroads contends that proposals of the eastern railroads (and others) to require less traffic and cost information than called for in the proposed procedures would not permit disposition of major interterritorial divisions cases in accordance with the standards of section 15(6)(a); they explain that proposals to make the guidelines permissive and to eliminate the traffic study provisions with respect to sampling (car tracing), would create delays and thereby frustrate the purpose of the RRRR Act to expedite divisions proceedings; and that proposals to tighten up cost study provisions by requiring the use of Rail Form A would merely encourage rigidity or stagnate efforts to improve costing methodology. They state that some parties fail to take account of, or give recognition to the importance of statutory criteria of efficiency and public importance. They also contend that procedural recommendations of some of the parties would deprive defendants of an adequate opportunity to prepare their case and would result in inefficiency and waste of the Commission's time; they explain that the proposal (ER) to limit the time for filing evidence in support of a cross-complaint to 30 days after the complaint is filed (rules (r) and (s)) would not allow defendants sufficient time to thoroughly prepare their case; that the proposal (ER) to change the time for notice of needed special studies from 30 days after commencment of the cost studies to 90 days after the commencement of joint traffic studies, could create difficulty because parties might not know whether

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*The suggestions referred to would: (1) modify rule (n) by eliminating the provisions according prima facie status to a special study prepared by only one of the parties; (2) eliminate the presumption of rule (v)(4) that "absent valid cost evidence to the contrary, origin and destination terminal costs *** shall be deemed the same"; and (3) modify the guidelines for the development of terminal costs by making clear that on-the-ground switching studies are not required.

special studies are needed until the cost studies are underway and such cost studies may not have begun 90 days following start of the joint traffic studies; and that the proposal (MKT and ER) to eliminate the prima facie status accorded to special studies made by one party where the other party fails to participate (rule (n)), would remove any incentive for compliance with the Commission's determination that such studies should be made.

Eastern railroads contend generally that the presentations of the southern railroads, Southern Governors' Conference and mountain-Pacific railroads needlessly inject issues that are inappropriate in this proceeding. They also point out that their agreement in docket No. 35585 to engage in joint studies, as well as the details of such studies, is not binding in any future proceeding. More specific replies are made to comments relating to the proposed rules and to comments relating to the suggested guidelines.

With respect to the proposed rules the eastern lines disagree with MPR's recommended amendment of rule (c) to require that the justification for proposed changed divisions be specified "with exactness," because the involved traffic and the proposed divisions might not be known prior to completion of studies. They also oppose as "completely unreasonable" MPR's proposed change in rule (j) to require that complainants disclose "all the evidence they will submit as part of their case-in-chief (except for their cost studies)" at or prior to completion of the joint traffic study, but they do not object to the idea of requiring complainant to advise defendants of the nature and substance" of all evidence upon which they intend to rely, as suggested by the southern railroads; should such an amendment be made they suggest that the data for evidence disclosure to 60 days prior to filing of the formal complaint, thereby allowing defendants 90 days for rebuttal; they agree with other carrier groups that the restriction on discovery should be eliminated. As to rule (k) these parties disagree with the Family Lines' position that a railroad should not be required to participate in the joint traffic study, and note that Family Lines does not dispute the Commission's power to impose such a requirement. They consider to be unnecessary, burdensome and time-consuming MPR's recommended amendment of rule (o) to require a complainant to furnish a statement of its position when it files its case-in-chief. Also considered to be productive of unnecessary delay is the recommendation of southern railroads that rule (r) be amended to allow defendants an additional 5 months after filing their answer in which to file their rebuttal in proceedings under notice of intent procedure. The eastern lines agree with the mountain Pacific carriers that under the 1-year limit after filing of the complaint for completion of the evidentiary proceeding, it is possible under the present rules that briefs might become due by the date hearings are completed; to resolve this difficulty they suggest that rule (u) be further amended to provide that briefs shall be filed 13 months after the filing of the complaint or 30 days after completion of the evidentiary hearing, whichever date is earlier. Relying to objections to the requirement of rule (v)(1) that allegations of inefficiency be pleaded affirmatively (MPR, SR, and SGC), they assert that the proposed rule does not change the burden of proof, but merely requires the issue of an opponent's alleged inefficiency to be raised at an early stage of the proceeding. The eastern lines agree with the southern lines that the cost of capital should not be excluded from consideration in divisions cases, and believe that rule (v)(2) is ambiguous. They oppose all proposals of the Southern Governors Conference to provide for its participation at the notice of intent stage, contending that the conference will have the right to participate as an intervenor after the complaint is filed. Finally, they deem improper and contrary to the expedited procedure objective of the RRRR Act, the additional rule proposed by MPR which would interpret section 15(6)(b) so that the 270-day period within which the Commission must issue its final order begins to run from the time the case is submittted to the Commission itself, rather than from the time all evidentiary hearings are completed.

With respect to the suggested guidelines, eastern railroads do not object to including additional information in the traffic study where the parties so agree or the Commission so orders, but object to mountain-Pacific's proposal that such information be "for each sample carload," thereby mandating a tracing study. On cost evidence matters they object to mountain-Pacific's proposed addition of several elements to the cost study which relate to that group's claim of unique service and have no place in general rules, and the reference to maintenance costs for "segments" of line and to specified costs for specific traffic, all of which implies a host of special studies that would be unnecessary in most cases; they consider to be elusive and confusing the substitution throughout the rules of the term "efficient costs" where "costs" now appears, as recommended by southern railroads; and while they do not agree with criticisms of Rail Form A advanced by the mountain-Pacific and southern lines, they recognize that Rail Form A should not be the only cost method acceptable in divisions cases. Eastern railroads do not disagree with the southern railroads' objection to the limited reference to subsidies in connection with revenue need evidence and suggest additional language so as to include subsidies other than those for passenger and commuter operations. And finally, with respect to evidence of efficiency and public importance, they favor the more general approach advocated by Southern lines over the detailed evidence advocated by the mountain Pacific carriers, which they oppose; and while they agree to the first two paragraphs of attachment C to the southern railroads' statement, they disagree with the third paragraph because the negotiation and Commission action which it calls for during the traffic and cost studies could result in unnecessary delay.

The National Industrial Traffic League suggests in a general reply that provision be made for special expedited handling of divisions disputes which are of a limited nature, involving a single railroad as a proponent of a new or changed joint rate.

The Long Island Railroad Company, by way of background, points up the interdependency of railroads in the handling of interterritorial traffic and stresses the adverse impact on the rail transportation system as a whole of inadequate divisional revenues on any link of that system. Broadly speaking, it is of the view that the proposed rules will not expedite the handling of litigation and will merely transfer delays to the notice of intent stage, and that proposals of the mountain-Pacific and southern railroads to make the rules more flexible would needlessly complicate procedures and permit greater delay—a major tactic utilized by such groups for resisting proposed changed divisions. Long Island asserts that due to the huge universe of statistics involved in major divisions proceedings, as in the case of per diem or tank mileage allowance matters, it is impossible to provide absolute certainty as to costs. This line further asserts that much of the information called for in forms advocated by the southern railroads is not necessary to determine the traffic characteristics and costs, and that the recommendation of the mountain Pacific roads to develop traffic and operating characteristics on a case-by-case basis would open Pandora's Box and eliminate any possibility of expeditious handling. What is needed to expedite divisions cases, says Long Island, are specific and concise procedures. A set of traffic form[9] is attached which Long Island recommends for use, along with its outline of traffic, and cost procedures, to form the basis of an interim decision;[10] should a clear need for further refinement appear the Commission could then direct parties to conduct special studies and make the impact of such studies retroactive to the date of the interim order.

More specifically, Long Island agrees with eastern railroads that the time period for the traffic study should not be restricted to a calendar year and that the mandatory 6 months, negotiation period requirement should be eliminated; it notes that traffic and cost studies should be progressed simultaneously, but that the time frame of each need not be identical. Replying to statements of the eastern and southern roads with respect to sampling, this carrier asserts that the sample size should be left up to the complainant who must bear the burden of proof, but due to the long time required to trace cars the size should be kept to a minimum and should not be increased to provide the "efficient costs" referred to by the southern railroads. Replying to statements which oppose the proposal to require that allegations of inefficiency be pleaded affirmatively (rule (v)(1)), Long Island asserts that it is reasonable to assume that each railroad is operated as efficiently as the governing circumstances permit. Commenting on the consideration of revenues needs called for in section 15(6)(a), this party notes that in general increase proceedings the Commission has generally authorized increases which would also provide revenue for deferred maintenance or capital expenditures, and contends that the Commission must treat the matter of revenue needs in divisions proceedings exactly the same way that it did in general rate increase proceedings. Responding to recommendations of the Southern Governors' Conference calling for greater attention to the public importance factor of divisions, Long Island suggests that rule (v)(2) be amended to provide that loans and subsidies by Federal and State governments will be considered as evidence of public importance, but stresses that the presence of subsidy has no relevance to the issue of inefficiency. This line agrees with the position of the eastern roads opposing the presumption that terminal costs of joint rates are the same at origin and destination (rule (v)(4)), and favors a presumption that the terminal costs of the issue traffic are at least equal to the system average terminal costs. Finally, Long Island asks the Commission to make clear that in future divisions cases it will consider other relevant facts and circumstances, including results stemming from extensive rate grouping.

Chicago and North Western Transportation Company directs its reply to the statement of mountain Pacific railroads, particularly its attack on the use of Rail Form A because it does not reflect "rail service in the mountains." C&NW states that the mountain-Pacific lines sought to advance that argument in the most recent case involving midwest and eastern interterritorial traffic, but that after 4 1/2 years of hearings and a voluminous record, most of which involved costs, the Commission concluded that once necessary adjustments had been made in the mountain Pacific lines' cost study, the final answers were not significantly different from system Rail Form A costs (*Akron, C.&Y. R. Co.* v. *Atchison, T. & S. F. Ry. Co.*, 321 I.C.C. 17, 47). It was to prevent such stretched-out proceedings that section 201 of the RRRR Act was enacted, but congressional intent will be frustrated if parties to interterritorial divisions cases are required, before they file their complaint, to make an interminable number of studies to measure the "specific costs" of the involved traffic, according to this party. C&NW stresses that some sort of formula must be required, whether it be Rail Form A or some other formula developed after further study. This carrier also disagrees with the recommendation of the mountain Pacific roads that complaining roads be required to submit evidence "as to the efficiency of their facilities used in handling the specific traffic at issue" because it is the efficiency of the carrier, not its facilities, that the Commission must measure. Disagreeing with the proposal to require complainants to make their evidence available to defendants during the notice-of-intent phase, C&NW asserts that such an arrangement would permit harrassment of complainant by defendant and make it almost impossible for complainant to prepare its case.

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[9] Forms supplied by Long Island would separate traffic and operating characteristics into the following areas: (1) revenue and waybill data; (2) car data, car cycle and terminal handling; (3) train characteristics; and (4) inter- and intratrain switching.

[10] Although a specific rule providing for a provisional or interim order is unnecessary, Long Island requests the Commission to make clear that such an option exists.

Chicago, Rock Island and Pacific Railroad Company contends that the presentation of mountain Pacific railroads is but a defense in an anticipated divisions case and that the filing of the southern railroads is but preparation for the anticipated renewal of the north-south divisions case. Rock Island indicates that neither submission is objective or helpful in developing appropriate rules.

APPENDIX C

Appendix B of notice of proposed rulemaking

SUGGESTED GUIDELINES FOR PREPARATION AND SUBMISSION OF RELEVANT DATA BY THE PARTIES

General.—It is the intent of the Commission that the opposing parties will cost out traffic studies and file the results in summary form showing comparisons with the revenues on both an "as settled basis" and an "as proposed basis." The detail described below need not be filed with the Commission but must be available on request.

Traffic study.—All railroads which participate in the joint rates shall develop a joint study of the issue traffic for the most current calendar year available. The study shall include a probability sampling of the actual traffic handled during identical time periods for each study carrier.

The study carriers shall consist of all railroads which derive operating revenues from the issue traffic. The issue traffic consists of those shipments[1] on which the freight rates or charges will be affected by a change in the percentage used to divide the through revenue. From the traffic study, the total through revenue and the revenue as settled under the present basis of divisions, and as proposed should be developed and submitted into evidence. Any accessorial charges which are divided on a basis other than that used to determine the present division percentages shall be separated and shown as a separate item. The present method of dividing these accessorial charges also must be explained.

The railroads must take their sample of the issue traffic handled by the study carriers according to acceptable standards of probability sampling principles and practices and shall explain and evaluate the probability sample from the standpoint of purpose, sample design (including explanation of estimation procedure and disclosure of sampling errors for derived characteristics), quality control aspects involved in processing and tabulating data and statistical analyses performed on the sampled data. Although not adopted by the Commission, attention is called to a staff report, "Guidelines for the Presentation of the Results of Sample Studies," February 1, 1971, available from the Superintendent of Documents.

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[1] The term "shipments" shall be construed to include "passengers" insofar as applicable to divisions disputes involving transportation of passengers. In such cases, the traffic study shall include the number of revenue passengers and revenue passenger-miles.

The traffic study shall develop the following characteristics, as appropriate:

(1) Commodity or commodities;
(2) Types of car and trailer;
(3) Weight of lading, billed and actual;
(4) Short-line mileages (average or way and through, loaded and empty) for each segment of the joint movements;
(5) Types of traffic, including northbound, southbound, et cetera, originating line, intermediate line, terminating line;
(6) Transit or nontransit; and,
(7) TOFC by plan number.

The traffic study shall include collection of divisions and other revenue data for each sample carload on a railroad-by-railroad basis. An individual railroad total and/or a territorial total, as applicable, shall be aggregated for each type of traffic referred to in (5) above.

The following additional information, as appropriate, shall be obtained for each sample carload of issue traffic:

(1) Route of movement mileages for each segment of the joint movements, separately for each involved carrier, including mileages over class II and switching and terminal companies. These mileages should reflect loaded and empty movement in way and through trains;
(2) Tare weight of the cars and trailers;
(3) Number and identification of interchange and intertrain switching points for each carrier involved in the through movements;
(4) Identification and trailing weight of the trains in which each sample carload moved;
(5) Identification and horsepower of the motive power used for each train referred to in (4) above;
(6) Identification of accessorial services;
(7) Computation of (loaded and empty) car-days spent at origin, destination, and intermediate points and transit time;
(8) Identification of all empty route of movement mileage and car-days associated with movement of the sample traffic cars;
(9) Identification of switching absorptions; and,
(10) Identification of platform service at origin and destination where service is performed under the line-haul rate.

Cost study.—Each class I railroad which participates in the joint rates also should prepare a cost study. Rail Form A, Public Statement 1F1-73, entitled "Formula for use in Determining Rail Freight Service Costs," published by the Commission's Bureau of Accounts, may be used to develop freight service unit costs. Also, Rail Form A, modified as necessary, may be used to develop service unit costs for each class II line-haul railroads, the modifications maintaining the same basic separations of expenses between terminal and line-haul as set forth in Rail Form A. Costs of switching and terminal companies shall be excluded from Rail Form A service unit costs and the actual line-haul absorptions substituted therefor. If adjustments are made to the Rail Form A service unit costs, special studies used to support such adjustments shall be submitted so that the procedures employed in these studies may be readily evaluated. The cost studies shall reflect the railroads' expenses and statistics for the same annual period utilized in developing the traffic study data. The final adjusted service unit costs shall then be applied to the traffic study service units for each sample carload on a railroad-by-railroad basis. Totals shall then be aggregated for each railroad and/or territory for each of the types of traffic subject to the affected divisions.

The individual railroad's traffic service units as developed from its respective traffic study shall be used in the cost analyses by all railroads or groups of railroads in developing costs at the variable and fully allocated cost levels with the constant cost distributed on the ton and ton-mile basis.

Terminal costs shall reflect:

(1) Type of car used by the sample traffic cars;
(2) Actual lading weight of the sample traffic cars;
(3) Special service costs at origin and destination applicable to the specific traffic at issue;
(4) Car-day costs based on actual car-days of the empty and loaded car at origin or destination of the sample traffic cars;
(5) Trailer-day costs based on actual trailer-days of the empty and loaded trailers at origin and destination of the sample traffic trailers;
(6) Switching costs at origin or destination applicable to the sample traffic cars; and,
(7) Station clerical costs at origin and destination applicable to the specific traffic at issue.

Line-haul costs shall reflect:

(1) Type of car used by the sample traffic cars;
(2) Actual lading weight of the sample traffic cars;
(3) Route of movement mileage (loaded and empty) in average, way or through trains of sample traffic cars, including loaded backhaul mileage as required;
(4) Tare weight of sample traffic cars;
(5) Trailing weight of trains in which the sample traffic cars move;
(6) Number of diesel units on trains in which the sample traffic cars move;
(7) Helper services applicable to sample traffic;
(8) Car days in transit for the loaded movement of the sample traffic cars plus allowance for empty time;
(9) Exclusion of car-days incurred on sample cars attributable to accessorial service not included in the line-haul rate; and,
(10) Exclusion of platform service costs where the revenue is collected as a separate charge and platform service is not included as a portion of the line-haul rate.

Line-haul switching costs shall reflect:

(1) The number of interchanges of rail cars handling sampling traffic;
(2) The number of highway interchanges of trailers handling sample traffic:

(3) The number of intertrain and intratrain switches of sample traffic cars,

(4) Car days at interchange, intertrain and intratrain switching points of sample traffic cars plus allowances for empty time; and,

(5) Trailer days at interchange, intertrain and intratrain switching points of sample traffic trailers plus allowances for empty time.

Additional cost consideration.—Accessorial revenues and associated costs shall be excluded to the extent these services are not included in the line-haul rate.

Accounting and operating records of each such study carrier as obtained from the annual report to the Interstate Commerce Commission, operating reports and special studies shall be used in the development of the unit costs for each participating carrier.

Unit costs for interchange services shall be applied per interchange rather than on a car-mile basis. Where sample traffic originates or terminates on a connecting line-haul or switching and terminal company that receives an absorption for its switching services, the line-haul carrier shall apply its interchange unit cost per car plus the absorption at that point and eliminate the origination or termination switching cost, as applicable.

Unit costs for intertrain and intraintrain switching shall be applied on a per-switch basis rather than a car-mile basis.

Train-mile unit costs shall reflect the actual number of diesel units in the trains handling the sample traffic cars. Train-mile unit costs should also reflect the trailing weight of the trains handling the sample traffic cars.

Marine-operation costs shall be excluded from computation of the unit costs and applied on a direct basis including appropriate departmental and general overheads.

Revenue need evidence.—Each railroad or group of railroads which participates in the joint rates or fares should submit evidence of system revenue needs. For this purpose, the following specific data and information, combined where appropriate into applicable carrier groupings, shall be submitted:

(1) Selected financial data of the kind prescribed for the schedule A filings, as prescribed and defined in Ex Parte No. 290, *Procedures Governing Rail General Increase Proc.* (351 I.C.C. 619 and 620).

(2) Income and sum-of-money data of the kind prescribed and defined for schedule B (part I, column (a) through (c) only) in Ex Parte No. 290, *supra.*

For the purposes of compiling these data "base year-actual" shall be the same annual period utilized in developing the traffic and costs study data suggested herein. If relevant, the carriers may, at their option, provide in addition to these data cost of capital studies or any other evidence having a direct bearing on their revenue needs to earn a fair return on rail property held for and used in the service of transportation. Also, in instances where the system revenue needs of the opposing parties are markedly different, the carriers may wish to allocate a portion of such overall revenue need to the traffic at issue. In such cases, the allocation scheme employed should be fully explained, and where necessary, supported by a detailed, independent study of the revenue contributions to system revenues generated by the issue traffic. In instances where passenger and or commuter operations are subsidized, such facts and attendant circumstances should be fully disclosed, including a detailed accounting of the subsidies relative to total revenue.

(APPENDIX C continued)

Appendix C of notice of proposed rulemaking

PROPOSED AMENDMENT OF PART 1109, TITLE 49 OF THE CODE OF FEDERAL REGULATIONS, BY ADDITION OF RULES, STANDARDS AND PROCEDURES FOR THE CONDUCT OF PROCEEDINGS FOR THE ADJUSTMENT OF DIVISIONS OF JOINT RATES OR FARES

Section 1109.5—Expeditious handling of divisions of revenue cases.

(a) Prior to (1) the filing of a notice of intent to file a complaint, or (2) the filing of a formal complaint in a divisions case, it must be shown that the complainant or prospective complainant, during the 6-month period immediately prior to filing, willingly sought to negotiate the divisions arrangement in issue but failed, and as proof thereof such party must submit to the Commission a verified statement summarizing the negotiations and a specification of the areas where agreement could not be reached. Failure to submit such a verified statement shall result in dismissal of a notice of intent to file a complaint or denial of a formal complaint.

(b) The original of each notice of intent to file a formal complaint or amendment thereto must be accompanied by copies in sufficient number to enable the Commission to serve one upon each participating carrier, including each receiver or trustee, and retain six copies in addition to the original. The Commission will serve notice of intent to file formal complaints and amended notices thereof in the same manner as provided for service of formal complaints under rule 34 of the Commission's General Rules of Practice.

(c) The notice of intent to file a complaint shall specify with exactness (i) the traffic and joint rates concerning which an adjustment of divisions is ought, (ii) the territorial scope of the traffic involved, (iii) the railroads which participate in such joint rates, and (iv) the present and proposed divisional basis.

(d) The party filing a notice of intent shall (i) indicate when the filing of a formal complaint is contemplated, (ii) exercise due diligence to meet such filing date, and (iii) file a formal complaint within a reasonable period of time after the filing of a notice of intent.

(e) The party filing a notice of intent shall every 3 month, with copies to potential defendants, advise the Commission of the anticipated date for the filing of a formal complaint. Letter replies by potential defendants will be permitted. Repeated postponements of the anticipated date for filing a formal complaint shall establish a lack of due diligence and in that event an order will be entered dismissing the notice of intent to file a complaint.

(f) A party served with a notice of intent to file a formal complaint shall within 30 days of such notice advise the Commission in the manner set forth in rule (b) above of its intent to file a cross complaint. If a party served with a notice to file a formal complaint does not intend to file a cross complaint no action under this rule need be taken.

(g) Notice of intent to file cross complaints shall be subject to the same rules applicable to notice to file a formal complaint.

(h) Cross complaints shall be subject to the same rules applicable to formal complaints.

(i) Notice of intent to file a cross complaint shall be consolidated with a notice to file a complaint. The cross complaint must be filed within 30 days of the filing of the formal complaint. Failure to submit the cross complaint when due shall result in its dismissal and the affirmative relief sought may not be reinstituted until after the pending formal complaint is decided.

(j) Discovery should be utilized to assemble evidence of the type referred to in appendix B hereto.

(1) A party filing a notice of intent to file a complaint shall be accorded the right to discovery applicable to orally heard cases. The same right of discovery shall be accorded the opposing party, provided that the opposing party has notified the Commission within 30 days of being served with the notice of intent to file a complaint that it intends to exercise its right of discovery.

(2) Parties to a formal complaint, instituted after the notice of intent to file a complaint procedure have been followed, shall not, unless specifically ordered by the Commission, be permitted to exercise discovery. It is anticipated that the full right of discovery will have been exercised under the notice of intent to file procedures.

(3) If a formal complaint is filed by a party that did not utilize the notice of intent to file procedures, the right of discovery shall only be granted to the opposing party. This right may be exercised by the opposing party within 6 months of the filing of the complaint.

(k) Joint traffic studies shall be conducted under the "notice of intent to file a complaint" procedure in those instances where the opposing party has either notified the Commission of its intent (1) to file a cross complaint or (2) to exercise its right of discovery. A joint study of the traffic in issue, utilizing the guidelines specified in appendix B hereto shall commence 30 days after either of the above options has been elected and shall be completed within 6 months, unless otherwise ordered by the Commission.

(l) Cost studies shall be prepared individually by the parties, and shall be completed within 6 months after the preparation of the joint traffic study, unless otherwise ordered by the Commission. The cost studies shall be developed in accordance with Rail Form A properly adjusted to reflect the characteristics of the traffic in issue and properly updated to a current level in accordance with the guidelines specified in appendix B hereto.

(m) Special studies shall be governed by the following procedure:

(1) Within 30 days of the commencement of the cost study set forth in (l) above a party desiring to conduct a special study shall notify the party on the other side of the controversy, in writing with a copy to the Commission, of the purpose of the special study and the cost and time such special study will entail.

(2) If the party so notified is willing to conduct a similar special study or cooperate in the conducting of a joint special study, the parties may proceed with the special study after first advising the Commission of the additional time, if any, needed to complete the project.

(3) If the party so notified is unwilling to conduct a similar special study, that party shall so inform the party on the other side of the controversy, in writing with a copy to the Commission, of the reasons for not performing similar special studies.

(4) Either party or both parties jointly may request the Commission to hold a prehearing conference to determine the need for the special study.

(n) Prehearing conferences may be scheduled to resolve the validity of discovery requests. Prehearing conferences will also be used to expedite the procedures and to

determine the need for special studies. If it it determined that special studies should be conducted and a party fails to conduct such special study or studies, prima facie status will be accorded the special study conducted by the other party in the ensuing formal complaint proceeding.

(o) Complainant must submit its case-in-chief at the time the formal complaint is filed and formally docketed. All underlying papers in support of a case-in-chief shall be made available to the other side, upon request.

(p) Defending carrier or carriers must within 30 days of service of the formal complaint file an answer.

(q) If the formal complaint was not preceded by a notice to file a complaint, the answer should specify, if alleged, how the case-in-chief fails to conform to appendix B guidelines. Failure to conform to guidelines set forth in appendix B hereto shall result in an order dismissing the complaint.

(r) If the formal complaint was preceded by a notice to file a complaint, then the case-in-rebuttal must be filed with the answer. All underlying papers in support of a case-in-rebuttal shall be made available to the other side, upon request.

(s) If the formal complaint was not preceded by a notice of intent to file a complaint, and the proceeding is not dismissed for failure of complainant to conform to the guidelines of appendix B hereto, then defending carrier or carriers must submit their case-in-rebuttal within 6 months of the filing of the complaint.

(t) Unless otherwise ordered by the Commission, divisions cases will be handled under the modified procedure, and oral hearing, if any, will be held only for cross examination.

(u) Once the formal complaint and both case-in-chief and in rebuttal have been submitted, the parties may thereafter submit only reply evidence unless otherwise directed by order of the Commission. In any event, the complainant must go forward with its case in an expeditious manner or otherwise the Commission may dismiss the complainant for lack of prosecution. Dilatory tactics by either party will not be tolerated.

(v) The following procedural rules and evidentiary presumptions are established: (1) any allegation of inefficiency must be pleaded affirmatively; (2) matters involving elements of profit and income tax, passenger, commuter and less-than-carload (LCL) deficits shall no longer be treated as proper items of expense in developing fully allocated costs (see *Rules to Govern Assembling & Presenting Cost Evidence*, 337 I.C.C. 298 (1970)), but shall be treated solely under the issue of revenue need; (3) the same divisional basis should apply uniformly on all "border point" traffic, which is defined as traffic originated or terminated at one point on the territorial border, interchanged at another border point, and then transported into the interior of either territory; and (4) absent valid cost evidence to the contrary, origin and destination terminal costs of a joint-line through movement shall be deemed to be the same.

APPENDIX D

Amendment of Part 1109, Title 49 of the code of Federal Regulations, by addition of rules, standards, and procedures for the conduct of precedings for the adjustment of divisions of joint rates or fares

Section 1109.5—Expeditious handling of divisions of revenue cases.

(a) Prior to (1) the filing of a notice of intent to file a complaint, or (2) the filing of a formal complaint in a divisions case, it must be shown that the complainant or prospective complainant, during the 6-month period immediately prior to filing, willingly sought to negotiate the divisions arrangement in issue but failed, and as proof thereof such party must submit to the Commission a verified statement summarizing the negotiations. Failure to submit such a verified statement may result in dismissal of a notice of intent to file a complaint or denial of a formal complaint. Any part of the 6-month period may be waived by the Commission on motion of the complainant or prospective complainant if it can be shown that other parties to a divisional dispute have failed to meet and conduct meaningful negotiations with the complainant or prospective complainant.

(b) The original of each notice of intent to file a formal complaint or amendment thereto must be accompanied by copies in sufficient number to enable the Commission to serve one upon each party, including when bankrupt lines are involved each receiver or trustee, and retain six copies in addition to the original. The Commission will serve notices of intent to file formal complaints and amended notices thereof in the same manner as provided for service of formal complaints under rule 34 of the Commission's General Rules of Practice.

(c) The notice of intent to file a complaint shall specify in general terms, subject to modification as the evidence is developed: (i) the traffic and joint rates concerning which an adjustment of divisions is sought; (ii) the territorial scope of the traffic involved; (iii) the railroads which participate in such joint rates; and (iv) the present and proposed divisional bases.

(d) The party filing a notice of intent shall (i) indicate when the filing of a formal complaint is contemplated, (ii) exercise due diligence to meet such filing date, and (iii) file a formal complaint within a reasonable period of time after the filing of a notice of intent. In no event shall the filing of a formal complaint be greater than 18 months after the filing of a notice of intent unless the Commission shall first order extension of time upon good cause shown.

(e) The party filing a notice of intent shall every 3 months, with copies to potential defendants, advise the Commission of the anticipated date for the filing of a formal complaint. Letter replies by potential defendants will be permitted. Repeated postponements of the anticipated date for filing a formal complaint may establish a lack of due diligence and in that event the Commission may enter an order dismissing the notice of intent to file a complaint.

(f) A party served with a notice of intent to file a formal complaint shall within 30 days of such notice advise the Commission in the manner set forth in rule (b) above of its intent to file a cross complaint. If a party served with a notice to file a formal complaint does not intend to file a cross complaint no action under this rule need be taken.

(g) Notice of intent to file cross complaints shall be subject to the same rules applicable to notice to file a formal complaint.

(h) Cross complaints shall be subject to the same rules applicable to formal complaints.

(i) Notice of intent to file a cross complaint shall be consolidated with a notice to file a complaint. The cross complaint must be filed within 30 days of the filing of the formal complaint. Failure to submit the cross complaint when due shall result in its dismissal and the affirmative relief sought may not be reinstituted until after the pending formal complaint is decided.

(j) Discovery should be utilized to assemble evidence of the type referred to in the appendix hereto.

(1) A party filing a notice of intent to file a complaint shall be accorded the right of discovery applicable to orally heard cases. The same right of discovery shall be accorded the opposing party, provided that the opposing party has notified the Commission within 30 days of being served with the notice of intent to file a complaint that it intends to exercise its right of discovery.

(2) Parties to a formal complaint instituted after the notice of intent to file a complaint procedure has been followed, may upon petition and demonstration of good cause and order by the Commission exercise their rights of discovery.

(3) If a formal complaint is filed by a party that did not utilize the notice of intent to file procedures, the right of discovery shall only be granted to the opposing party. This right may be exercised by the opposing party within 6 months of the filing of the complaint.

(k) Joint traffic studies shall be conducted under the "notice of intent to file a complaint" procedure in those instances where the opposing party has either notified the Commission of its intent (1) to file a cross complaint, or (2) to exercise its right of discovery. A joint studv of the traffic in issue shall commence 30 days after either of the above options has been elected and shall be completed within 6 months, unless otherwise ordered by the Commission.

(l) Cost studies shall be prepared individually by the parties, and shall be completed within 6 months after the preparation of the joint traffic study, unless otherwise ordered by the Commission. Absent a more reliable method, the cost studies should be developed in accordance with Rail Form A properly adjusted to reflect the characteristics of the traffic in issue in accordance with the guidelines suggested in the appendix hereto and properly updated to a current level. However, other methods of cost allocation may also be used to the extent that more accurate or reliable cost data results.

(m) Special studies shall be governed by the following procedure:

(1) Within 30 days of the commencement of the cost study set forth in (l) above a party desiring to conduct a special study shall notify the party on the other side of the controversy, in writing with a copy to the Commission, of the purpose of the special study and the cost and time such special study will entail.

(2) If the party so notified is willing to conduct a similar special study or cooperate in the conducting of a joint special study, the parties may proceed with the special study after first advising the Commission of the additional time, if any, needed to complete the project.

(3) If the party so notified is unwilling to conduct a similar special study, that party shall so inform the party on the other side of the controversy, in writing with a copy to the Commission, of the reason for not performing similar special studies.

(4) Either party or both parties, jointly may request the Commission to hold a prehearing conference to determine the need for the special study.

(n) Prehearing conferences may be scheduled to resolve the validity of discovery requests. Prehearing conferences may also be used to expedite the procedures and to determine the need for special studies. If it is determined that special studies should be conducted and a party fails to conduct such special study or studies, in the absence of valid evidence to the contrary, prima facie, status will be accorded the special study conducted by the other party in the ensuing formal complaint proceeding.

(o) Complainant must submit its case-in-chief at the time the formal complaint is filed and formally docketed. All underlying papers in support of a case-in-chief shall be made available to the other side, upon request.

(p) Defending carrier or carriers must within 30 days of service of the formal complaint file an answer. Extensions of time to file an answer will be granted by order of the Commission upon the filing of a petition which demonstrates good cause.

(q) If the formal complaint was preceded by a notice to file a complaint, then the case-in-rebuttal must be filed with the answer. All underlying papers in support of a case-in-rebuttal shall be made available to the other side, upon request.

(r) If the formal complaint was not preceded by a notice of intent to file a complaint, then defending carrier or carriers must submit their case-in-rebuttal within 6 months of the filing of the complaint.

(s) Unless otherwise ordered by the Commission, divisions cases will be handled under the modified procedure, and oral hearing, if any, will be held only for cross-examination.

(t) Once the formal complaint and both cases-in-chief and in rebuttal have been submitted, the parties may thereafter submit only reply evidence unless otherwise directed by order of the Commission. In any event, the complainant must go forward with its case in an expeditious manner or otherwise the Commission may dismiss the complainant for lack of prosecution. Dilatory tactics by either party will not be tolerated.

(u) The following procedural rules and evidentiary presumptions are established: (1) matters involving elements of profit and income tax, passenger, commuter and LCL deficits shall no longer be treated as proper items of expense in developing fully allocated costs (see *Rules to Govern Assembling & Presenting Cost Evidence*, 337 I.C.C. 298 (1970)), but shall be treated solely under the issue of revenue need; (2) all passenger, commuter or freight subsidies should be disclosed in accordance with the guidelines contained in the appendix hereto; (3) the same divisional basis should apply uniformly on all "border point" traffic, which is defined as traffic originated or terminated at one point on the territorial border, interchanged at another border point, and then transported into the interior of either territory; and (4) absent valid evidence to the contrary, the appropriate territorial or system average origin and destination terminal costs shall be deemed to be applicable to origin and destination terminal services.

APPENDIX D

Guidelines for preparation and submission of relevant data by the parties

General.—It is the intent of the Commission that the opposing parties will cost out traffic studies and file the results in summary form showing comparisons with the revenues on both an "as settled basis" and an "as proposed basis." Set forth below are guidelines for the preparation of traffic and cost studies. These guidelines should not be construed as imposing limitations as to additional data which may be required to develop a complete record in any particular proceeding; but should be utilized to the extent it is reasonably practicable to do so and as agreed upon by the parties, or as ordered by the Commission. The detailed traffic and cost information resulting from such studies need not be filed with the Commission, but must be made available in the offices of the Commission on request.

Traffic study.—All railroads making a joint study shall develop their joint study of the issue traffic for the most current calendar year available or another appropriate period agreed upon by the parties as respresentative. The study shall include a probability sampling of the actual traffic handled during identical time periods for each study carrier or group of carriers.

The study carriers shall consist of all railroads which derive operating revenues from the issue traffic. The issue traffic consists of those shipments[1] on which the freight rates or charges will be affected by a change in the percentage used to divide the through revenue. From the traffic study, the total through revenue and the revenue as settled under the present basis of divisions, and as proposed should be developed and submitted into evidence. Any accessorial charges which are divided on a basis other than that used to determine the present division percentages shall be separated and shown as a separate item. The present method of dividing these accessorial charges also must be explained.

The railroads must take their sample of the issue traffic handled by the study carriers according to acceptable standards of probability sampling principles and practices and shall explain and evaluate the probability sample from the standpoint of purpose, sample design (including explanation of estimation procedure and disclosure of sampling errors for derived characteristics), quality control aspects involved in processing and tabulating data and statistical analyses performed on the sampled data. Although not adopted by the Commission, attention is called to a staff report, "Guidelines for the Presentation of the Results of Sample Studies," February 1, 1971, available from the Superintendent of Documents.

The traffic study shall develop the following characteristics, as appropriate:

(1) Commodity or commodities;
(2) Types of car and trailer;
(3) Weight of lading, billed or actual, as appropriate;
(4) Short line mileages to and from interchange points or territorial gateways;
(5) Types of traffic separated by directional flow by originating, intermediate or terminating line or such other basis as may be appropriate;
(6) Transit or nontransit;
(7) TOFC by plan number; and
(8) Accessorial services.

The traffic study shall include collection of divisions and other revenue data for each sample carload on a railroad-by-railroad basis. An individual railroad total and/or a territorial total, as applicable, shall be aggregated for each type of traffic referred to in (5) above.

The following additional information, as appropriate, shall be obtained for the sample traffic:

(1) Loaded route of movement mileages in average or way and through trains, separately for each involved carrier, including mileages over class II and switching and terminal companies;
(2) Tare weight of cars and trailers;
(3) Number and identification of interchange, intertrain and intratrain switching points for each carrier involved in the through movements;
(4) Trailing weight of the trains;

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[1] The term "shipments" shall be construed to include "passengers" insofar as applicable to divisions disputes involving transportation of passengers. In such cases, the traffic study shall include the number of revenue passengers and revenue passenger-miles.

(5) Number of locomotive units in trains;

(6) Identification of accessorial services;

(7) Loaded and empty car-days at origin, destination and intermediate points and loaded and empty car-days running service;

(8) Empty route of movement mileage in average or way and through trains;

(9) Identification of switching absorptions; and,

(10) Identification of platform and other special services where service is performed under the line-haul rate.

Cost study.—Each class I railroad or groups of class I railroads, as appropriate, which participates in the joint rates also should prepare a cost study. Rail Form A, Public Statement 1F1-73, entitled *Formula for use in Determining Rail Freight Service Costs,* published by the Commission's Bureau of Accounts, may be used to develop freight service unit costs. Also, Rail Form A, modified as necessary, may be used to develop service unit costs for each class II line-haul railroad, the modifications maintaining the same basic separations of expenses between terminal and line-haul as set forth in Rail Form A. Costs of switching and terminal companies shall be excluded from Rail Form A service unit costs and the actual line-haul absorptions substituted therefor. If adjustments are made to the Rail Form A service unit costs, special studies used to support such adjustments shall be submitted so that the procedures employed in these studies may be readily evaluated. The cost studies should reflect the railroads expenses and statistics for the most recent calendar year, or for the latest available 12 months. The cost studies should be conducted for identical time periods by all of the parties. The final adjusted service costs shall then be applied to the traffic study service units on a railroad-by-railroad basis. Totals shall then be aggregated for each railroad and/or territory for each of the types of traffic, as appropriate, subject to the affected divisions.

The individual railroad's or groups of railroads' traffic service units as developed from the study of its traffic shall be used in the cost analyses by all railroads or groups of railroads in developing costs at the variable and fully allocated cost levels with the constant costs distributed on a uniform basis agreed upon by the parties.

Terminal costs for the sample traffic, shall reflect, as appropriate:

(1) Type of car;

(2) Actual or billed weight, appropriately explained;

(3) Special service costs;

(4) Car-days at origin or destination plus allowances for empty time;

(5) Trailer-days at origin and destination plus allowances for empty time;

(6) Switching costs; and,

(7) Station clerical costs.

Line-haul costs for the sample traffic shall reflect, as appropriate:

(1) Type of car;

(2) Actual or billed weight, as appropriately explained;

(3) Route of movement mileage (loaded and empty) in average or way and through trains, including loaded backhaul mileage as required;

(4) Tare weight of cars;

(5) Trailing weight of trains;

(6) Number of locomotive units;

(7) Helper services;

(8) Car-days in running service for the loaded movement plus allowance for empty time;

(9) Trailer-days in running service for the loaded movement plus allowance for empty time;

(10) Exclusion of car-days and trailer-days attributable to accessorial service not included in the line-haul rate; and,

(11) Exclusion of platform and other special service costs where the revenue is collected as a separate charge and such service is not included as a portion of the line-haul rate.

Line-haul switching costs for the sample traffic shall reflect, as appropriate:

(1) The number of interchanges of railcars;

(2) The number of highway interchanges of trailers,

(3) The number of intertrain and intratrain switches;

(4) Car-days at interchange, intertrain and intratrain switching points plus allowance for empty time; and,

(5) Trailer-days at interchange, intertrain and intratrain switching points plus allowance for empty time.

Additional cost consideration.—Accessorial revenues and associated costs shall be excluded to the extent these services are not included in the line-haul rate.

Accounting and operating records of each such study carrier as obtained from the annual report to the Interstate Commerce Commission, operating reports and special studies shall be used in the development of the unit costs for each participating carrier.

Unit costs for interchange services shall be applied per interchange rather than on a car-mile basis. Where sample traffic originates or terminates on a connecting line-haul or switching and terminal company that receives an absorption for its switching services, the line-haul carrier shall apply its interchange unit cost per car plus the absorption at that point and eliminate the origination or termination switching cost, as applicable.

Unit costs for intertrain and intratrain switching shall be applied on a per-switch basis rather than a car-mile basis.

Train-mile unit costs shall reflect the actual number of locomotive units in the trains associated with the sample traffic. Train-mile unit costs should also reflect the trailing weight of the trains associated with the sample traffic.

Marine-operation costs shall be excluded from computation of the unit costs and applied on a direct basis including appropriate departmental and general overheads.

Revenue need evidence.—Each railroad or group of railroads which participates in the joint rates or fares should submit evidence of system revenue needs. For this purpose, the following specific data and information, combined where appropriate into applicable carrier groups, shall be submitted:

(1) Selected financial data of the kind prescribed for the schedule A filings, as prescribed and defined in Ex Parte No. 290, *Procedures Governing Rail General Increase Proceedings*, (351 I.C.C. 619 and 620).

(2) Income and sum of money data of the kind prescribed and defined for schedule B (part I, column (a) through (c) only) in Ex Parte No. 290, *supra*.

For the purpose of compiling these data "base year-actual" shall be the same annual period utilized in developing the traffic and cost study data suggested herein. If relevant, the carriers may, at their option, provide, in addition to these data, cost of capital studies or any other evidence having a direct bearing on their revenue needs to earn a fair return on rail property held for and used in the service of the interline traffic at issue. Also, in instances where the system revenue needs of the opposing parties are markedly different, the carriers may wish to allocate a portion of such overall revenue need to the traffic at issue. In such cases, the allocation scheme employed should be fully explained, and where necessary, supported by a detailed, independent study of the revenue contributions to system revenues generated by the issue traffic. In instances where facilities and/or operations of passenger, commuter or freight services are subsidized, such factors and attendant circumstances should be fully disclosed, including a detailed accounting of the subsidies relative to total revenue.

Evidence on efficiency and public importance.—Each railroad or group of railroads or any other participant should submit evidence pertaining to the "efficiency with which the carriers concerned are operated" and "the importance to the public of the transportation services of such carriers," as required by section 15(6)(a). Recommended evidence of efficiency should include, but not be limited to, data concerning existing duplication of facilities, slow orders, speed of movements, plans for track abandonment, plans for rehabilitation and modernization of yards and other facilities, deferred maintenance, accidents, and equipment utilizations. Recommended evidence of public importance should include, but not be limited to, data concerning the availability of alternative transportation modes for issue traffic, impact of service deterioration or of increased rates with respect to issue traffic on the economies of affected regions, and the extent to which lines and facilities used in connection with the issue traffic have been, are or will be subsidized by Federal, State, or local governments. Joint studies to produce evidence on efficiency and public importance are encouraged.

No. 36331

POSTING AND FILING OF ROUND-TRIP EXCURSION FARES

Decided January 27, 1977

Revised rules and regulations prescribed to permit posting and filing of round trip excursion fares on 1 to 3 working days' notice to the public and the Commission.

Fritz R. Kahn and *Eugene T. Liipfert* for Continental Trailways, Inc.

W. L. McCracken for Greyhound Lines, Inc.

REPORT OF THE COMMISSION

DIVISION 2, COMMISSIONERS HARDIN, O'NEAL, AND CHRISTIAN

BY THE COMMISSION:

This proceeding was commenced by notice of proposed rulemaking and order of the Commission, Division 2, dated April 8, 1976, and published in the Federal Register on April 21, 1976 (40 F.R. 16781). Amendments to section 1306.4(a)(2) and (3) of Title 49 of the Code of Federal Regulations were proposed to lengthen the period of required notice to the public and the Commission from 3 days to 5 days when motor common carriers of passengers seek to post and file round trip excursion fares limited to a designated period of more than 3 days but not more than 30 days.

An increase in the notice period was proposed because of our concern that the 3-day notice period was insufficient to allow interested parties to timely file petitions requesting suspension or investigation prior to the effective date of the excursion fare. This problem was believed to be particularly accute when the notice was filed on a Friday. If the notice were filed on a Friday the intervening nonworkdays would effectively shorten the notice period to 1 day or less as the tariff would, absent suspension, become effective on the following Tuesday.

REPRESENTATIONS OF THE PARTIES

A copy of the notice of proposed rulemaking and order was served on all common carriers of passengers by motor vehicle, to the Governor of each State, and to the public utilities commission or board having jurisdiction over transportation in each State. Copies were also deposited with the Office of the Secretary, Interstate Commerce Commission, and the Director, Office of the Federal Register. Initial statements were received from Continental Trailways, Inc. (Continental), and Greyhound Lines, Inc. (Greyhound). A reply was received from Continental.

While agreeing with the underlying purpose of the proposed regulations, Continental does not believe that they represent the most efficient method of dealing with the problem of timely notice. Observing that the bus industry has not received a proportionate share of the national increase in intercity travel over the past decade,[1] Continental urges that motor passenger carriers must have sufficient flexibility to attract additional passengers by innovative pricing of services, such as lower excursion fares. It asserts that imaginative pricing by individual carriers is necessary to develop new marketing opportunities, and that the competitive advantage obtained by such carriers will be negated if competitors may duplicate such fares by occasioning administrative delays. It believes that the proposed rule change would impede a motor passenger carrier's ability to serve the consumer by developing potential marketing opportunities. While it agrees that sufficient time must be given the Commission and interested parties to review the tariff filings prior to their effective date, it believes that the present 3-day period is sufficient, provided that the 3 days are all working days. It proposes that the present regulations be modified to provide for 3 days' notice, not including Saturdays, Sundays, or holidays.

Greyhound concedes that the 3-day period would provide the Commission and the parties sufficient opportunity to review tariff filings, if limited to business days. However, where a tariff is filed with the Commission before an intervening nonworking day, the present regulations permit lesser practical notice prior to the effective day. Complete denial of notice could occur where the filing is made immediately preceding a 3-day holiday weekend. They do not oppose the proposed 5-day notice period, but are concerned that the effect of changing from 3 to 5 days the notice required for a tariff effective from 3 to 30 days while keeping the 1-day notice requirement for a tariff effective for 1 to 3 days will be to interrupt the effectiveness of the tariff. Currently, a tariff covering the same service at the same rate may be filed under both provisions to permit implementation on 1 day's notice and continue it for a total of 30 days. Greyhound believes that the proposed provisions would leave a 2-day period when no excursion fare would be in effect following expiration of the tariff filed pursuant to 49 CFR 1306.4(a)(1).

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[1] Continental asserts that the bus industry's share of domestic travel has fallen from 2.5 percent in 1966 to 1.9 percent in 1975.

Continental states in reply that the current 3-day notice period has proved sufficient to enable competitors to compile and file matching tariffs. Extending the notice period to 5 days would further discourage competitive pricing. Exclusion of Saturdays, Sundays, and holidays from the 3-day period would give the Commission sufficient time to examine the filings.

DISCUSSION AND CONCLUSIONS

We are persuaded that revision of the current regulations to provide that the time for measuring applicable notice periods for motor carrier round trip excursion fares shall not include Saturdays, Sundays, or holidays is the method best designed to insure interested parties a sufficient period to file petitions requesting suspension or investigation and to permit the Commission adequate time to review the tariff filings in the carrying out of its duties under the Interstate Commerce Act. Continuing the authority to file and post these round trip excursion fares on less than 30 days' notice is in the interest of the riding public. Accordingly, the current 1- and 3-day notice periods will not be changed, but shall be limited to workdays as defined in rule 1306.4(a)(4).

Competitive pricing of transportation services is a laudatory goal, so long as it does not lead to predatory practices. The instant regulations will permit motor passenger carriers the greatest flexibility consistent with the responsibilities of this Commission under the Interstate Commerce Act.

FINDINGS

We find that there is a continuing and present need to permit filing and posting of motor carrier round trip excursion fares on less than 30 days' notice; that establishment of a round trip excursion fare limited to a designated period of not more than 3 days should be permitted on notice to the Commission and the public of not less than 1 workday; that establishment of a round trip excursion fare limited to a designated period of more than 3 days but not more than 30 days or a series of round trip excursion fares covering a period not to exceed 30 days should be permitted on notice to the Commission and the public of not less than 3 workdays; and that this decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

An appropriate order will be entered.

COMMISSIONERS HARDIN did not participate.

APPENDIX A

§1306.4—*Round trip excursion fares*

(a) *Sale of tickets.* Fares for round trip excursions may be established, without further notice, upon posting tariffs in advance in a public and conspicuous place where tickets for such round trip excursions are to be sold, and filing two copies thereof with the Commission, as follows:

(1) For a round trip excursion limited to a designated period of not more than 3 days, including the first date any ticket to be sold under the tariff may be used for the going journey and the last date any ticket to be sold under the tariff may be used for the return journey, upon posting and filing with the Commission on not less than 1 workday's notice.

(2) For a round trip excursion limited to a designated period of more than 3 days but not more than 30 days, including the first date any ticket to be sold under the tariff may be used for the going journey and the last date any ticket to be sold under the tariff may be used for the return journey, upon posting and filing with the Commission on not less than 3 workdays' notice;

(3) For a series of round trip excursions, such series covering a period not to exceed 30 days, including the first date any ticket to be sold under the tariff may be used for the going journey and the last date any ticket to be sold under the tariff may be used for the return journey, upon posting and filing with the Commission on not less than 3 workdays' notice as to the entire series.

(4) For the purposes of this section, a workday shall be considered any day except Saturday, Sunday, or a legal holiday in the District of Columbia. A legal holiday of less than 1 day shall be considered a workday within the meaning of this section.

No. 36217

THE UNITED STATES DEPARTMENT OF DEFENSE v. INTERSTATE STORAGE AND PIPELINE CORPORATION

Decided February 4, 1977

Interstate Storage and Pipeline Corporation found to be engaged in the transportation of oil by pipeline in interstate commerce, and thus subject to the jurisdiction of the Interstate Commerce Commission.

Dellon E. Coker, Paul M. Scott, and *Capt. Robert N. Kittel* for complainant.

Eliot W. Denault, Jr., for defendant.

REPORT AND ORDER OF THE COMMISSION

DIVISION 2, COMMISSIONERS HARDIN, O'NEAL, AND CHRISTIAN

O'NEAL, *Commissioner:*

The modified procedure was followed. Exceptions to the initial decision of the Administrative Law Judge were filed by complainant to which defendant replied. Our conclusions differ in part from those of the Administrative Law Judge; however, the statement of facts by the Administrative Law Judge is correct in all material respects, and we adopt it as our own. The facts will be restated to the extent necessary for discussion. Exceptions and requested findings not discussed in this report nor reflected in our findings or conclusions have been considered and found not justified or their resolution not necessary for the proper disposition of this proceeding.

By complaint filed June 16, 1975, the U.S. Department of Defense, alleges that defendant, Interstate Storage and Pipeline Corporation, is a "common carrier" within the meaning of 49 U.S.C. §1(3)(a), and thus subject to the provisions of part I of the Interstate Commerce Act. Complainant prays: (1) that the defendant be required to comply with the publication of tariffs as provided for in

49 U.S.C. §6; (2) that the Commission investigate and ascertain the value of the property owned or used by the defendant pursuant to 49 U.S.C. §19(a); and (3) that the Commission require the defendant to submit annual reports in accordance with the provisions contained in 49 U.S.C. §20.

Defendant owns and operates a pipeline for the transmission of petroleum products, which is located entirely within the State of New Jersey. The pipeline consists of two segments, the first of which extends 7.2 miles from defendant's barge dock located on the east bank of the Delaware River, Burlington County, N.J., to its terminal storage facility at Jacksonville, N.J. The Jacksonville terminal storage facility consists of 10 storage tanks and a truck fill stand pump station. There are no tank truck or tank car receiving capabilities at the Jacksonville terminal. The second segment of the defendant's pipeline extends approximately 13.5 miles from the Jacksonville facility to the U.S. Government-owned bulk storage facility located at McGuire Air Force Base, N.J.

The Defense Fuel Supply Center purchases domestic and foreign fuel on behalf of complainant for the support of military activities in New Jersey. The domestic oil is either shipped by barge directly from the U.S. refineries to the defendant's receiving dock at Burlington, or shipped by barge to a deepwater terminal at Piney Point, Md., and stored in one of four 96,000-barrel bulk storage tanks. Likewise, foreign oil is shipped to Piney Point, Md., where it is stored for some time in the same 96,000-barrel bulk storage tanks prior to shipment by barge to the Burlington receiving dock of the defendant. All barges utilized in the transportation of the Defense Fuel Supply Center fuel from the refineries within the United States, and from the Piney Point storage facility are certified by the Commandant of the Coast Guard.

Defense Fuel Supply Center assumes and retains title and ownership of the fuel from the time it is loaded at the refinery until delivery at the ultimate consuming military installation. Furthermore, Defense Fuel Supply Center fuel is never commingled with commercial grades of fuel or fuel not owned by Defense Fuel Supply Center.

After the fuel arrives at the Jacksonville storage facility, it is not modified, except occasionally to inject an icing inhibitor which may have been lost during transportationor temporary storage. The fuel is also inspected at Jacksonville by Government inspectors to determine whether it meets the specifications required by the contract.

Fuel in 7 of the 10 storage tanks at Jacksonville, which are designated the Defense Fuel Supply Agency Contract tanks, remains in storage an average of 66 days before further shipment. Fuel in the remaining three operating tanks remains in storage 3 to 15 days prior to subsequent shipment. Some Defense Fuel Supply Center routing instructions are issued while the fuel is at the Jacksonville storage facility, while other instructions for McQuire Air Force Base shipments appear to be made prior to arrival of the fuel at the Burlington receiving dock.

The Administrative Law Judge found that defendant is a "common carrier" within the meaning of section 1(3)(a) of the Interstate Commerce Act.[1] However, he further concluded that complainant's shipment of domestic oil through defendant's pipeline facilities in New Jersey to military installations in New Jersey is exempt from Commission jurisdiction under section 1(2)(a) of the act[2] because it constitutes movement wholly with one State following exempt barge transportation. The Administrative Law Judge reasoned that since the barges in question are exempt from the economic regulation of the Commission under section 303(d) of the act, the subsequent pipeline transportation must also be exempt, citing as authority *Pennsylvania Railroad Co.* v. *Ohio Public Utilities Commission*, 298 U.S. 170 (1936); *Motor Transportation of Property Within Single State*, 94 M.C.C. 541 (1964), affirmed *sub nom. Pennsylvania Railroad Company* v. *United States*, 242 F. Supp. 890 (E.D. Pa. 1965); *Behnken Truck Service, Inc., Ext.—Exbarge Traffic*, 103 M.C.C. 787 (1967).

In considering the movement of foreign oil, the Administrative Law Judge, after referring to section 1(2)(a) of the act and the United States Circuit Court of Appeals decision in *Long Beach Banana Distributors, Inc.* v. *The Atchison, Topeka & Santa Fe Railway Company*, 407 F.2d. 1173 (9th Cir. 1969), recognized that under the law, shipments moving in foreign commerce are within the

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[1] Section 1(3)(a) of the Interstate Commerce Act provides: "(3)(a) The term 'common carrier' as used in this part shall include all pipe-line companies *** and all persons, natural or artifical, engaged in such transportation as aforesaid as common carriers for hire."

[2] Section 1(2)(a) of part I of the act states:

(2) The provisions of this part shall also apply to such transportation of passengers and property, but only in so far as such transportation takes place within the United States, but shall not apply—

(a) to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property, wholly within one State and not shipped to or from a foreign county from or to any place in the United States as aforesaid, except to otherwise provided in this part. ***.

Commission's jurisdiction regardless of whether foreign carriage is performed by for-hire carriage, exempt carrier, or private carrier. However, the Administrative Law Judge found no foreign commerce to exist under the factual circumstances since the foreign oil arriving at Piney Point, Md., is commingled with domestic fuel, thus losing its foreign character. Accordingly, the Administrative Law Judge ordered that the complaint be dismissed.

On exceptions, complainant contends that the Administrative Law Judge erred in finding, as a matter of law, that pipeline movements of domestic oil within a single State following interstate carriage by barge exempt from economic regulation by the Commission are intrastate and not interstate commerce. Complainant explains that the Administrative Law Judge erroneously relied on Commission cases involving exbarge-motor carrier movement within a single State and failed to recognize that with respect to rail carriers, the Commission has taken the position that exbarge-rail movements are in interstate commerce and subject to Commission jurisdiction despite the exempt character of the barges, citing *Monsanto Co.* v. *Alton & Southern Ry. Co.*, 339 I.C.C. 319 (1971); and *Osborne McMillain Elevator Co.* v. *M., St. P. & S.S.M.R. Co.*, 306 I.C.C. 155 (1959). It is complainant's position that a pipeline facility more closely resembles a railroad operation than motor carriage operation and thus the Commission should find jurisdiction.

Furthermore, complainant contends that the Administrative Law Judge erroneously found that the foreign fuel loses its character when commingled with domestic oil at Piney Point, Md., and subsequently shipped to defendant's dock at Burlington. Complainant submits that even though the oil is commingled it does not lose its foreign character since the percentage volumes of foreign oil can be identified as part of the total volume.

Finally, complainant takes exception to the fact that the Administrative Law Judge failed to find that the involved movement of fuel by pipeline is physically interstate and thus subject to regulation by the Commission. Complainant indicates that the key factor in determining whether commerce is interstate or intrastate is the fixed and persisting intent of the shipper to move the goods beyond the State. Based on the evidence submitted, complainant contends that it has established as a matter of fact and law that the pipeline movements have the essential character of interstate commerce. Complainant argues that from the point of origin at the refinery at Piney Point, Md., it has professed and demonstrated its intent to transport oil to its consuming military installations in New Jersey.

As evidence thereof, complainant notes it has made advance arrangements for transportation of the oil beyond defendant's storage tanks at Jacksonville. Moreover, complainant points out that defendant has established a single rate for transportation through and beyond its terminal facilities at Jacksonville and that defendant has shipped oil from Burlington to McGuire Air Force Base under a single bill of lading.

In reply, defendant states that the Administrative Law Judge correctly found the considered pipeline movement to be intrastate. It argues that *Monsanto, supra,* is distinguishable from the instant case since *Monsanto* was decided on policy grounds because of competition between exempt barge and for-hire carriers, a factor which does not exist in this proceeding. Moreover, defendant points out that *Monsanto, supra,* was concerned with rail carriage rather than pipeline carriage. Furthermore, defendant argues that the factors necessary to show the continued intent of the shipper to move the product interstate are not present.

Discussion and Conclusions

The primary issue raised on exceptions is whether an exempt barge-pipeline movement, where the pipeline is situated solely within a single State, constitutes interstate commerce that is subject to Commission jurisdiction under section 1 of part I of the act. Although the precise question of Commission jurisdiction presented in this proceeding has not been determined in prior cases, the Commission and courts have considered exempt barge movements combined with common carriers by motor and rail, whose operations are confined within a single State. Such cases are helpful to understanding the present law and Commission policy concerning its assertion of jurisdiction over portions of intermodal operations involving unregulated carriers interlining with a carrier operating within a single State. At the same time, the question of whether such a pipeline, as a matter of law, is engaged in transportation in interstate or intrastate commerce, however, is different in many aspects from the similar questions which have arisen in the past with respect to motor carrier and railroad operations. For this reason the precedents which are to be found in the decisions of courts and the Commission relating to railroad and motor carrier operations must be considered subject to careful review of the principles involved and of their proper application in the very different circumstances of pipeline operations.

The Administrative Law Judge relied in part on the Supreme Court decision in *Pennsylvania, supra* (1936), in concluding that when complainant ships fuel through defendant's pipelines to its military installations in New Jersey that such commerce is not interstate, and thus not subject to Commission jurisdiction. In *Pennsylvania, supra,* a shipment of coal from the State of Pennsylvania was moved by "private" barge, tug, and rail to Negley, Ohio, where the coal was processed for sale and loaded aboard a common carrier by rail for transportation to consignees at Youngstown, Ohio, and other points in Ohio. The Supreme Court expressly stated that the question there in issue was not whether the movement was "that particular form of interstate commerce which Congress has subjected to regulation" under part I of the act. The Court found that the only transportation of coal by a common carrier was intrastate transportation between Negley and Youngstown. The Court refused to unify this shipment with the private carriage from Pennsylvania to Ohio to bring it within section 1 of part I of the act, stating that not all commerce is transportation and that transportation which is subject to regulation by the Commission "begins for that purpose, if not for others, when the merchandise has been placed in the possession of a carrier." The Court defined "carrier" to mean "common carrier."

Notwithstanding the *Pennsylvania* decision, a series of Commission decisions involving operating rights found that a combination of private and for-hire motor carrier movements, where the for-hire motor carrier was within a single State and preceded or followed by a private movement across the State line, is "interstate" commerce for the purposes of economic regulation under part II of the act. This was the position of former division 5 which had jurisdiction over motor carrier licensing matters. See *Bisceglia Contract Carrier Application*, 34 M.C.C. 233 (1942); *Dora Motor Carrier Operations Within Arizona*, 48 M.C.C. 171 (1948); *Eldon Miller, Inc., Extension—Illinois*, 63 M.C.C. 313 (1955); and *Hafner and Hanson Common Carrier Application*, 69 M.C.C. 581 (1957).

Contemporaneously with these division 5 decisions that the for-hire portion of the above-described movements is subject to economic regulation, division 2 adhered to the different view that under part II of the act single-State motor transportation of the type described is not subject to rate regulation. See *Service Transp. Co. Contracts and Agreements*, 44 M.C.C. 419 (1945); and *Iron and Steel Articles, Central Territory*, 53 M.C.C. 769 (1951).

In order to resolve the conflict between these lines of cases, the Commission instituted *Motor Transportation of Property Within Single State, supra.* The majority of the Commission in that proceeding found that the fundamental principles of the *Pennsylvania* case, *supra*, are not altered in dealing with part II instead of part I of the act, and that for-hire motor transportation, within the confines of a single State, of property which has moved from, or will move to, points beyond the same State in private motor carriage, is, so far as the for-hire transportation is concerned, not in interstate commerce subject to economic regulation under part II of the Interstate Commerce Act.

Moreover, the *Pennsylvania* doctrine was extended to include operations involving other nonregulated carriers in addition to private motor carriage. For example, in *Behnken Truck, supra,* dry bulk fertilizer was transported by for-hire barges exempt under section 303(b) of the act from origin points in Florida and Alabama to a Mississippi River port terminal. The shipments arriving at the terminal were transferred from barge to storage lines, and thence loaded into motor vehicles for further movement to points in Illinois. The Commission there applied the *Pennsylvania* doctrine to motor carriage, whether following exempt for-hire carriage or private carriage. See also *Commercial Carrier Corp. Extension—Salt*, 112 M.C.C. 415 (1970).

If we were to rely solely on the *Pennsylvania* and *Behnken Truck* cases, it would appear that a finding that defendant's pipeline is not subject to regulation would be warranted. However, the Commission has departed from the *Pennsylvania* doctrine in circumstances where overriding policy considerations have existed. For example in *Monsanto, supra,* the Monsanto Company alleged that switching rates charged and collected on salt by the defendant railroad on an interstate basis were inapplicable. The salt was shipped in bulk from points in Louisiana by for-hire bargelines, under the exemption of 303(b) of the act, to an East St. Louis, Ill., public wharf owned and operated by the defendant. There the salt was loaded into hopper cars and switched by defendant to complainant's facility at Sauget, Ill. There was an agreement between the parties that the movement was physically interstate and continuous. The basic issue was whether the character of the rail movement between points in Illinois, following interstate movement via for-hire water carriers operating under the exemption of section 303(b) of the Interstate Commerce Act, is interstate or intrastate. Complainant rested principally on the *Pennsylvania* and *Behnken Truck* cases, *supra.*

The Commission found that the above-cited cases did not compel a departure from other holdings of the Commission and the courts that interstate, not intrastate, rates apply on railroad movements within a single State that precedes or follow the continuous water transportation of freight in interstate commerce, irrespective of whether the transportation by a water carrier is regulated or not, citing *Osborne McMillan Elevator Co.* v. *M., St. O. & S.S.M.R. Co., supra.*

The Commission's decision was based not only on its historical treatment of exbarge rail movements but also on important policy considerations which were expressed in the *Monsanto* report as follows:

> Apart from the established precedents, effective regulation by the Commission obligates us to assert jurisdiction over transportation performed within a single State that precedes or follows exempt for-hire transportation in interstate or foreign commerce. In many instances, such exempt for-hire carriage is performed in competition with carriers that are subject to jurisdiction. To further the competitive inequality between them by regulating the movement within the single State in one instance and not in the other would handicap even more the carriers which the Commission regulates. *** [Footnote reference omitted.] 339 I.C.C. at 323.

The preceding cases reveal that the Commission's assertion of its regulatory jurisdiction over carriers is partly dependent on the mode of carrier involved. Motor, railroad, and other modal regulation often differ in character and degree not only because they are frequently administered under different provisions of the act, but also because of differences in their operations and in regulatory objectives. Thus, we see nothing of compelling precedent value as far as this proceeding is concerned in the determinations made in either *Pennsylvania* or *Behnken, supra.*

Pipelines are a unique type of transportation system and their importance to the national economy and defense cannot be overstated. They carry energy resources upon which our Nation is vitally dependent. Public policy and the law dictate a preference of Federal regulation where pipelines are involved in interstate or foreign commerce.

Commission jurisdiction over water carriers is conferred in section 302 of the act which provides that, for purposes of part III of the act, the term "water carrier" is defined as a common or contract carrier by water and the term "common carrier by water" is defined as a person holding itself out to the public as providing for-hire transporation of property or passengers by water. Several classes of water carriage are exempted from regulation under part III of the act including, as pertinent here, under section 303(d) the transportation of liquid commodities in bulk in tank vessels certified by the Commandant of the Coast Guard. Thus, for purposes of part III of the act, the involved barge operations here do not constitute operations of a part III water carrier. However, in *Valley Line Company* v. *United States*, 390 F. Supp. 435 (W.D. Pa. 1975), the court held that the precise language of section 302(e), permitting the Commission to exempt certain water contract carrier operations, limited such exemption to part III of the act and that such a water carrier was still subject to the provisions of part I of the act. The exemption provided by section 303(d) is also limited to part III of the act, and, under the *Valley Line* rationale, we conclude that a carrier operating under such an exemption[3] is also subject to the provisions of part I of the act.

In section I of part I of the act, the Commission's jurisdiction over railroads and pipelines is described in the following manner:

> (1) That the provisions of this part shall apply to common carriers engaged in—
>
> (a) the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment; or
>
> (b) The transportation of oil or other commodity, except water and except natural or artificial gas, by pipe line or partly by pipe line and partly by railroad or by water[.]

Thus, a common carrier movement of oil partly by pipeline and partly by water is expressly subjected to the Commission's jurisdiction by this provision. In *Monsanto, supra*, and *Osborne McMillan Elevator Co., supra*, the Commission asserted jurisdiction over joint water-railroad movements on the theory that there was an arrangement for a continuous carriage, but, as seen above, the continuous carriage criteria is conspicuously absent from section 1(1)(b), and we cannot rely on either of those cases to support a finding that the Commission has jurisdiction under section 1(1)(b) over an interstate exempt water carrier-pipeline movement.

Section 1(3)(a) provides that the term "common carrier" as used in part I includes "all pipe-line companies; express companies; sleeping-car companies; and all persons, natural or artificial, engaged in such transportation as aforesaid as common carriers for hire," and that the term "transportation" as used in part I includes

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[3] This reasoning also applies to water carrier operations conducted under the exemptions provided by sections 303(b), (c), (e), (f), (g), and (h).

"locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage." The critical language is "all persons * * * engaged in such transportation as aforesaid as common carriers for hire." "Such transportation as aforesaid," among other things, refers to "the transportation of oil or other commodity * * * partly by pipe line and partly * * * by water." A water carrier operating under the section 303(d) exemption satisfies this criteria, and, if also holding itself out to the public to provide such transportation on a for-hire basis, it will satisfy the "common carrier" definition of section 1(3)(a).

This conclusion is supported by the historical development of section 1(1)(b). It was under the Hepburn Act of 1906 that section 1 was expanded to include pipelines. Subsequently, under the Transportation Act of 1920, section 1(1)(b) was enacted basically in its present form. It is important to note, however, that it was not until the Transportation Act of 1940 that water carriers were regulated under part III of the act, and that such regulation was and is very limited, providing a great number of exemptions. Thus, at the time of enactment of the considered section on pipelines, all water carriers were effectively exempt from regulation. However, it is quite clear that Congress considered exempt water carriers to be common carriers or the section 1(1)(b) reference to the regulation of pipeline-water carrier movements would be a nullity. Moreover, the earlier version of the present section 1(1)(b), as enacted under the Hepburn Act, leaves little doubt that Congress considered water carriers that were not then under Commission regulation to be "common carriers" as far as section 1 is concerned.

The earlier version of section 1 under the Hepburn Act reads:

> That the provisions of this Act shall apply to any corporation or any person engaged in the transportation of oil or other commodity, except water and except natural gas or artificial gas, by means of pipe lines, or partly by pipe lines and partly by railroad, or partly by pipelines and partly by water, *who shall be considered and held to be common carriers within the meaning and purpose of this act*, and to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad (or partly by railroad and partly by water when both are used under common control, management, or arrangement for a continuous carriage or shipment) ***. [Emphasis added.]

We see no difference between water carriers that were not under regulation at the time that section 1(1)(b) was enacted and those water carriers today exempt from regulation under part III of the act.

Thus, while we have made the determination that an interstate exempt barge-pipeline movement, where the pipeline is situated solely within a single State, is a form of transportation subject to Commission regulation under section 1 of the act, we have not as yet addressed the question whether the movements of petroleum here under consideration are in fact in interstate commerce. In determining whether a carrier or carriers are engaged in interstate commerce, the Commission must determine the essential character of the commerce. One of the most important factors in determining the essential character is the fixed and persisting intent of the shipper, or the one for whose benefit the shipment is made. See *Iron and Steel Articles, Wilmington to Points in N.C.*, 323 I.C.C. 740, 742 (1965), affirmed *sub nom. North Carolina Utilities Commission* v. *United States*, 253 F. Supp. 930 (E.D. N.C. 1966); and *Rush Common Carrier Application*, 17 M.C.C. 661 (1939). Other factors to be considered are the character of the billing, that is, whether it is local or through, change of ownership during the course of transportation, knowledge or lack of it on the part of the consignor of the ultimate destination or consignees, the character and length of the transaction taking place at the point of interruption, the intent on the part of the consignor with reference to the final destination, breaking of bulk and commingling of the commodity shipped with other shipments of the same commodity, power of the owner of the property to divert the shipment after the initial movement has begun, and the general practices and customs prevailing in a particular industry or trade. No single factor is necessarily to be regarded as determinative in the final conclusion as to the essential character of the traffic. *Thomas Keery Co., Inc.*, v. *New York, O. & W. Ry. Co.*, 206 I.C.C. 585, 588-589 (1935).

Here, the petroleum is purchased and shipped from foreign and domestic refineries outside the State of New Jersey to defendant's barge dock at Burlington, thence by defendant's pipeline to its Jacksonville storage terminal facility and thereafter shipped by defendant's pipeline to McGuire Air Force Base in New Jersey. Defendant in its opening statement contends that since there are no through shipments by it of petroleum due to the storage of the petroleum in tanks at its Jacksonville facility, consequently, its pipeline operation should be considered intrastate. We find no merit to this contention. While it has been held in *Petroleum Products Transported Within a Single State*, 71 M.C.C. 17 (1957); and *Atl. C. L.R.R.* v. *Standard Oil Co.*, 275 U.S. 257 (1927), that the storage of petroleum or petroleum products at terminal storage points for indefinite periods may end the interstate character of the commerce and that subsequent independent movements are intrastate, those cases are clearly distinguishable from the instant proceeding. In the two cited cases, there was no evidence of an intent on the part of the original shippers to ship the products through terminal storage to interior points or ultimate consumers under any through arrangement or method involving a continuity of transportation. In contrast, in the instant proceeding the evidence manifests that the complainant had the intention of shipping petroleum to its military installations in New Jersey, particulary, McGuire Air Force Base and not merely to the storage tanks at Jacksonville. This intention is supported by the following undisputed facts of record. First, that at all times in the transportation of the petroleum from refinery to consuming military installations the title is and remains with complainant. Second, that defendant makes provision for and has tariffs assessing a single charge for transportation of oil from its barge dock facilities at Burlington through its Jacksonville facilities to McGuire Air Force Base, New Jersey, and that defendant has in fact shipped substantial quantities of oil pursuant to its contract with complainant under a single through rate from Burlington to McGuire Air Force Base. Third, that arrangements for through shipments to McGuire Air Force Base are at times made prior to the arrival of fuel at defendant's Burlington receiving dock. Fourth, that defendant's pipeline is primarily designed to serve McGuire Air Force Base. And finally, that the fuels in defendant's tanks at Jacksonville remain only 3 to 15 days after receipt in operating tanks, and for an average of 66 days in DFSA contract storage tanks and that during storage the oil is not processed in any substantial manner except occasionally to inject small amounts of icing inhibitor under Government supervision.

To be distinguished from the instant proceeding is the Commission's decision in *Jet Fuel By Pipeline Within the State of Idaho*, 311 I.C.C. 439 (1960), which involved the storage of jet fuel at a pipeline storage terminal and its subsequent movement by pipeline. The Commission found therein that the subsequent pipeline movement was intrastate commerce. The *Jet Fuel* decision is significant in terms of this proceeding. While the Commission acknowledged the "intent of the shipper" criterion for determining the character of traffic espoused in *Petroleum Products, supra,* and *Atlantic Coast Line R. Co.* v. *Standard Oil Co., supra,* it basically relied on two other factors—the extent of processing performed at the storage point and the change in ownership of the jet fuel. The Commission in *Jet Fuel* explained its finding as follows:

> Before the fuel can be transported to the Air Force base it must be filtered and processed for removal of interface materials and other impurities and then stored for an indefinite time until it can be tested by Air Force engineers. Only after it meets Air Force specifications will the title pass and the jet fuel be available for transportation to the Air Force base. This processing before reshipment is a manifestation that the continuity of the movement will have been interrupted to such an extent that the interstate movement is at an end. Thus, the subsequent transportation to the base will be subject to State regulation. 311 I.C.C. at 442-443.

In the instant proceeding, there is neither the extensive processing and testing of fuel as occurred in *Jet Fuel, supra*, nor the change in ownership. We find that the storage at the Jacksonville terminal is a temporary pause in the interstate transportation of petroleum that is destined to McGuire Air Force Base. Accordingly, we find that the movements of petroleum from refinery to the ultimate destination at McGuire Air Force Base, N.J., constitutes transportation in interstate commerce and that defendant's pipeline is engaged in such transportation in interstate commerce subject to Commission jurisdiction.[4]

Finally, because we have found defendant's pipeline to be participating in the interstate transportation of petroleum and subject to Commission regulation rather than transportation wholly within one State, it is not necessary to discuss whether the transportation of foreign petroleum may also be involved in the instant proceeding because jurisdiction is dependent upon its participation in transportation which is in either interstate *or* foreign commerce, not both.

ULTIMATE FINDINGS

1. That a water carrier exempt from regulation under part III of the Interstate Commerce Act is a common carrier for the purpose of subjecting interlining pipelines to Commission jurisdiction under part I of the act.

2. That the water carrier-pipeline movements of petroleum from U.S. origins located outside of New Jersey to the ultimate

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[4] It is significant to note that even if the storage at the Jacksonville terminal were found under a different set of facts to be a termination of interstate commerce, defendant's pipeline would still be subject to Commission regulation for the movement of petroleum from the dock of Burlington, N.J., over the approximate 7.2 miles of pipeline to the Jacksonville storage terminal, since that part of the movement of petroleum would still constitute interstate commerce

destination at McGuire Air Force Base, N.J., constitutes transportation in interstate commerce.

3. That the Interstate Storage and Pipeline Corporation is engaged in interstate transportation subject to Commission jurisdiction within the contemplation of section 1(1)(b) of the act to the extent it participates in such movements.

4. That the Interstate Storage and Pipeline Corporation is a common carrier pipeline company within the meaning of section 1(3)(a) of the act.

It is ordered, That defendant be required to file annual, periodic, and special reports, and to institute and maintain a uniform system of accounts applicable to pipelines, both under section 20 of the act,[5] and to publish and filed schedules showing the rates and charges for interstate transportation of petroleum products, pursuant to section 6 of the act.[6]

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[5] 49 U.S.C. § 20

(1) *Reports from carriers and lessors*
The Commission is hereby authorized to require annual, periodical, or special reports from carriers ***

* * * * * * *

(3) *Uniform system of accounts*
The Commission may, in its discretion, for the purpose of enabling it the better to carry out the purposes of this part, prescribe a uniform system of accounts applicable to any class of carriers subject thereto ***

(4) *Depreciation Charges*
The Commission shall *** prescribe for carriers the classes of property for which depreciation charges may properly be included under operating expenses, and the rate or rates of depreciation which shall be charged***

* * * * * * *

(8) *** the term "carrier" means a common carrier subject to this part ***

[6] 49 U.S.C. § 6

(1) Schedules of rates, fares, and charges; filing and posting. That every common carrier subject to the provisions of this chapter shall file with the Commission *** and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation ***

No. 36085

FORD MOTOR COMPANY v. ERIE LACKAWANNA RAILWAY COMPANY (THOMAS F. PATTON AND RALPH TYLER, JR., TRUSTEES)

Decided March 3, 1977

Additional switching charges assessed for respotting of partially loaded or unloaded freight cars at complainant's Mahwah, N. J., plant found applicable and not shown to be unjust and unreasonable or otherwise unlawful. Complaint dismissed.

Donald J. Clark, *David R. Larrouy*, and *Walter Vashak* for complainant.

J. T. Clark for defendant.

REPORT AND ORDER OF THE COMMISSION ON RECONSIDERATION

DIVISION 2, ACTING AS AN APPELLATE DIVISION, COMMISSIONERS HARDIN, O'NEAL, AND CLAPP

O'NEAL, *Commissioner:*

The modified procedure was followed. By complaint filed April 10, 1974, Ford Motor Company (Ford), a Delaware corporation, alleges that defendant, Erie Lackawanna Railway Company (Thomas F. Patton and Ralph Tyler, Jr., Trustees), as part of its delivery of carload shipments, performs switching services of those cars between its classification yard adjacent to the plant and the unloading locations within the confines of the plant, and that during the removal of empty cars from the plant and delivery of loaded cars, Erie has respotted partially unloaded cars to different spots on the same track at the request of Ford, and that Erie has unlawfully assessed switching charges in addition to its line-haul rates on the above movements from May 19, 1971 to April 10, 1974 under Item 1220-A of its Tariff 5103, ICC 125 (Erie Series). Complainant further alleges that the assessment of such charges in addition to the line-haul rates violates sections 1(5), 1(6), and 6(7) of the Interstate Commerce Act and seeks a cease and desist order and a waiver of collection of undercharges by defendant on the above-described movements, or such other relief as this Commission shall determine complainant is entitled to, or shall order.

In the initial decision, served July 30, 1975, the Administrative Law Judge found the shifting of partially loaded or unloaded cars at Ford's platform along the same track, including the mat area, which is made necessary by Erie's normal switching operations, is not a second placement of those cars but is a part of the carrier's line-haul obligation, and that collection of an additional charge would be illegal in violation of section 6(7) of the act under the interpretation given Item 1220-A of Erie Tariff 5103, but if this item were found applicable, such collection would be unjust and unreasonable in violation of sections 1(5) and (6) of the act. By Decision and Order of the Commission, served May 17, 1976, Review Board Number 4, (Board Member Shaw dissenting), adopted the recommended decision. A motion to strike defendant's petition for reconsideration, and, in the alternative, a reply to the petition for reconsideration was filed by Ford on July 6, 1976. Erie replied to the motion to strike on July 12, 1976. An order by Division 2, Acting as an Appellate Division, served October 5, 1976, denied the motion to strike and reopened the proceeding for reconsideration on the present record. Our ultimate findings differ from those of the review board.

The proceeding arose out of an action at law filed against Ford by Erie for collection of the assessed switching charges. By order of the Superior Court of New Jersey Law Division, Hudson County, dated October 21, 1974, in Docket No. L-14000-73, the action was stayed pending a determination by this Commission of the applicable and lawful charges.

The issue is whether respotting of partially loaded or unloaded cars to different bays at the request of the plant personnel is incidental to the removal of empty cars from the plant and the delivery of loaded cars.

Ford receives carload shipments of auto parts at its Mahwah, N.J., assembly plant from various locations throughout the United States and Canada. Erie is the delivering carrier, and it switches the loaded cars between its classification yard adjacent to the plant and the unloading locations within the confines of Ford's plant. To spot the loaded cars at Ford's dock, Erie must switch out empty cars and partially unloaded cars. Unless it receives instructions to the contrary from Ford, Erie respots the partially unloaded cars at the same places or at least in the same bay.[1] It makes no charge for this respotting. However, frequently, Ford gives specific written instructions to have the partially unloaded cars respotted in different bays, and Erie has assessed extra charges for such service, which are the subject of this complaint. The unloading area consists of two parallel tracks divided into five separate bays. A diagram of the unloading area is set out below. For convenience, we have lettered the pertinent mat areas and bays.

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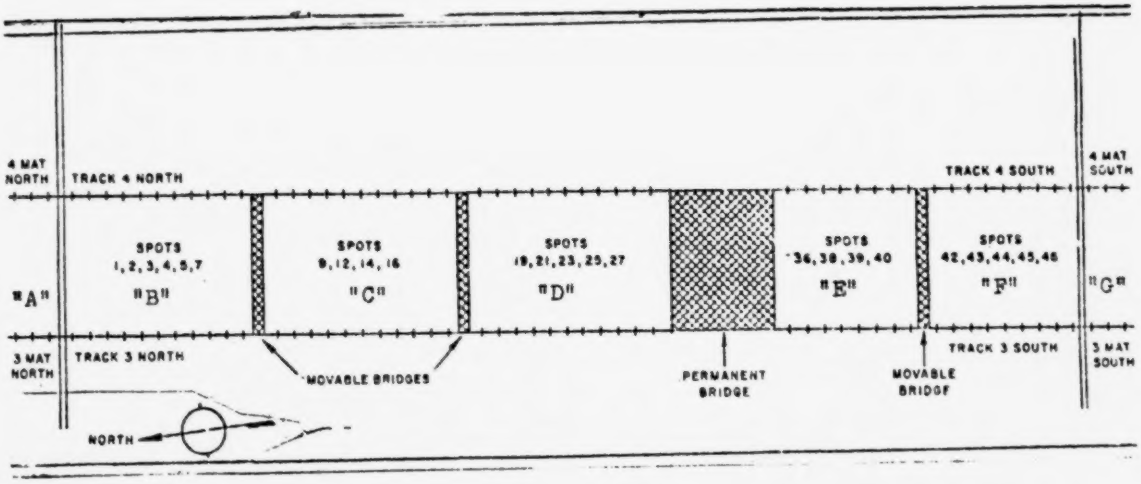
[1] A "bay" is the area between movable bridges within complainant's plant. Each bay contains from four to six spots.

DIAGRAM OF RAILROAD UNLOADING AREA AT FORD MOTOR COMPANY MAHWAH, N.J. ASSEMBLY PLANT


4 MAT NORTH
TRACK 4 NORTH
TRACK 4 SOUTH
4 MAT SOUTH
"A"
SPOTS 1, 2, 3, 4, 5, 7
"B"
SPOTS 9, 12, 14, 16
"C"
SPOTS 19, 21, 23, 25, 27
"D"
SPOTS 36, 38, 39, 40
"E"
SPOTS 42, 43, 44, 45, 46
"F"
"G"
3 MAT NORTH
TRACK 3 NORTH
MOVABLE BRIDGES
PERMANENT BRIDGE
MOVABLE BRIDGE
TRACK 3 SOUTH
3 MAT SOUTH
NORTH

As the above diagram shows, the unloading areas for the four tracks begin outside the building where concrete mats are in place. They are designated 3 and 4 north and 3 and 4 south. The tracks extend from the mat areas into the building and terminate on either side of a permanent in-plant bridge. Tracks 3 and 4 north are approximately 1300 feet long and are divided into three equal sections by two vertical movable bridges. Tracks 3 and 4 south are approximately 600 feet long and these two tracks are divided into two equal sections by one vertical, movable bridge. During switching operations, all movable bridges are lowered to track level and do not offer any interference when Erie switching crews place and remove cars.

Erie normally provides two switches per day, one at 5 a.m. and the other at 3 p.m. Under normal conditions, approximately 40 empty cars are removed and replaced with full loads on each switch. The balance of the cars removed, i.e., partially unloaded cars, are inserted into the new line-up of inbound loaded cars and are returned to the unloading area as respots. These respots may or may not be ordered to the same spots at which the cars were initially delivered. During periods of high business activity, the Erie provides additional switches at 10 a.m. and 8 p.m. Approximately 10 empty cars are removed and replaced by loaded cars during these switches.

Switching requests are communicated to the Erie in the form of a written order approximately 12 hours before the requested switch time. A single switch order covers both the north and south sections of a particular track. The car spots are listed numerically.

At the end of a work shift, production control personnel, who are charged with unloading responsibility, return a copy of the switch order to the traffic center. If a car has been unloaded and can be removed from the plant, an (X) is inserted in column "Unload." If unloading has not been completed and the car must be respotted, a check is placed in the "Spot Back" column, and Ford indicates the spot number at which the car is ordered to be placed. If in the spot column the spots are bracketed, it signifies to Erie that the cars may be placed in any order, within the brackets, that is convenient to Erie. Respot requests are forwarded to the carrier on the same switch order used to order new cars from the supporting rail yards.

Respotting of the partially unloaded cars is directed so as to improve unloading productivity and to maintain a fluid unloading operation. For example, many loads contain both passenger car and truck parts. Initial spotting of such cars will be made to points proximate to the passenger car lines, and, on the next switch, the cars will be spotted proximate to the truck production line. Similarly, equipped cars awaiting replacement of racks or containers are respotted to areas more accessible to the empty racks. Furthermore, during periods of high activity, loaded cars are initially spotted in the mat areas for removal of critical parts where, if the car is not completely unloaded, it may be respotted to a point more accessible to the production line on the next scheduled switch.

The switching movements in question are the removal from and return to, the same track, although not necessarily to the same spot, of partially unloaded cars. They may include car movements (1) from one spot to another spot in another bay, (2) from the mat area to an inside unloading spot, or (3) from one spot to another spot in the same bay. Erie currently assesses a switch charge for (1) and (2), but not for (3). Thus, Erie makes no charge for respotting of a car within the same bay. However, it does make a charge for respotting a car from a point in one bay to a point in another bay or from the mat area to a bay area.

Erie participates in TLCTR Local Freight Tariff 804, ICC C-853, which provides that no additional charge will be made where the switches are not in excess of the "ordinary operating convenience" of the carrier. The appropriate tariff items are set out in the appendix hereto. Ford submits that under that tariff Erie is required to respot without charge on bay-to-bay and mat-to-bay type movements, since these are incidental to the placement or removal of other cars, and not in excess of defendant's operating convenience. Specifically, complainant avers that the movable cross-over bridges do not alter or interfere wth the respotting procedure in any way and that the effort required to return cars to the unloading area is the same for each respot whether it is replaced to its original berth or otherwise so long as respotting is confined to the same track.

There appears to be no dispute that a respotting of a car from bay "B", spot 5, to bay "E", spot 39, for example, is an intraplant switch subject to a switch charge in addition to the line-haul rate. However, according to Ford, if a car is initially spotted in area "B" of the above diagram and then respotted during the process of removal or replacement of cars in area "B", there is no switch charge, yet, if the car is respotted to area "C" or "D" from "A" or "B" complainant is billed a switch charge. Ford contends the switch charge for this respotting is unlawful since this is switching "incidental" to the placement or removal of empty cars, or, in other words, the normal realignment of cars.

Defendant's position is that switching or respotting from a point in one bay to a point in another bay is not incidental to the placement and removal of other cars since the movements are ordered by Ford for its convenience and result in added time and expense to the railroad crews. It contends that the switching charges at issue involve switching for the sole benefit of the complainant, and under its published tariffs it is required to assess and collect the intraplant switching charges published in Item 1220-A of Tariff 5103, ICC 125 (Erie Series).[2] Thus, it is Erie's position that TLCTR Local Freight Tariff 804, ICC C-853 is inapplicable, since the respotting is in excess of the "ordinary operating convenience" of the carrier. Defendant explains that if no order to respot a partially unloaded car is given by Ford, the railroad would respot the car at the original spot or at another spot in the same bay to suit its own operating convenience. Defendant stresses that it assesses a switch charge only when Ford specifically orders a car switched from a spot in one bay to a spot in a different bay. Defendant briefly describes the involved switching service and explains how additional time and effort is required of the railroad to comply with complainant's written order. *Switching Service at Western Points,* 268 I.C.C. 740, is cited in support.

Erie assumes, for example, that car "A" is respotted from track 3, spot 46 to track 3, spot 39 with four new cars ordered between spots 42 and 46, namely, cars "B", "C", "D", and "E". If car "A" had been respotted back to track 3, spot 46, no additional switching would be involved since the car would remain coupled to the engine while it was being pulled out of the plant.

Defendant shows the additional work required to be performed by defendant's switch crew to position each car in the group of cars being replaced in order to comply with complainant's switch request. For example, to respot a car from track 3, spot 46 to track 3, spot 39 requires an additional "doubling"[3] of the cars out in the yard and a respotting of the entire track; some situations may require as many as three "doublings" to honor complainant's switch request. The additional time required by the crew to perform this alignment is estimated to be about 15 minutes. If the car had not been ordered to a specific spot, it would have remained coupled to the engine, and no additional switching or "doubling" would have been required to replace the car at its original location.

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[2] This tariff item publishes switching rate bases at Mahwah, N. J., for the following switching service:

> On cars, empty or loaded, spotted on a delivery track and subsequently ordered to another location within the same plant.

[3] The term "doubling" as used in this proceeding is the picking up of a group of cars, pulling out of a track, and placing those cars onto another adjacent track prior to a subsequent coupling and replacement of the entire string of cars in the Ford plant as ordered.

As noted above, the Administrative Law Judge found, among other things, that the respotting of cars involved herein was incidental to other necessary switching performed by the defendant, and a charge for such service, in additional to the line-haul charge, would be a violation of the act.

On exceptions, defendant submits that the considered removal and replacement of cars partially loaded or unloaded was not performed as a *necessary incident* to the placement and removal of cars moving at published carload rates, and thus such movements could not be deemed to be in the "ordinary operating convenience" of the carrier. Specifically, it reiterates that the orders for respotting are specified by complainant; that consequently it has no freedom to respot at locations convenient for its operations; that no deviation from the switch orders for its convenience is allowed; and that such respotting causes it to incur substantial switching time and expense in realigning the cars or the segment of track involved.

In reply, complainant argues that the respotting movements are incidental to defendant's other necessary switching operations, that defendant's allegation of the "extra work" involved in respotting is unsupported by the evidence, that, in any case, the amount of yard work cannot be the basis for the applicability of an intraplant switching charge, and that the respotting orders are transmitted so that defendant can fulfill its line-haul obligation.

DISCUSSION AND CONCLUSIONS

The issue for our determination is whether bay-to-bay respotting of partially loaded or unloaded cars during the removal of empty cars from the plant or the delivery of loaded cars is within the purview of Erie's line-haul obligation.

Generally, the line-haul obligation of a carrier is to provide a freight car, a proper place at which to load or unload it, the conveyance of that loaded car, and its terminal delivery. A proper place at which to load or unload entitles a consignor or consignee to have his shipment delivered at a reasonably convenient place, whether this be within the plant, or upon a track agreed upon by him and the carrier. It is clear that the service beyond such reasonably convenient point is not a service which the carrier is obligated to perform under the line-haul rates. See *Industrial Railways Case*, 29 I.C.C. 212 (1914); *Propriety of Operating Practices—Terminal Services*, 209 I.C.C. 11, 18, 27, 32 (1935); *Ford Motor Co. Terminal Allowance*, 209 I.C.C. 77, 80 (1935); *Keystone Steel & Wire Co. Terminal Allowance*, 209 I.C.C. 82, 85 (1935); *Terminal Allowances at Ashland, Ky.*, 213 I.C.C. 603, 610 (1936); *Chesapeake & O. Ry. Co.* v. *Westinghouse*, 270 U.S. 260 (1926).

As a result of Ex Parte No. 104, Part II, *Propriety of Operating Practices—Terminal Services, supra,* plant switching is to be included in the railroad's line-haul tariff rates when it is performed:

> (1) at the railroad's operating convenience;
> (2) in a continuous movement;
> (3) without interruption, or any interference caused by or for which the industry is responsible; and
> (4) not to exceed switching on team tracks, sidings, or spurs.

The Commission expanded the above definition in a report on further consideration in *Propriety of Operating Practices—Terminal Services*, 294 I.C.C. 705 (1955), wherein certain switching operations and factors related thereto were defined as part of the railroad's line-haul service, including the "removal and replacement of other cars" where "performed by the carrier as necessary incidents to the placement and removal of cars moving at published carload rates." The pertinent tariff items involved herein are largely a codification of the principles of the above-cited cases.

Moreover, in *Switching Service at Western Points*, 268 I.C.C. 740 (1947), we discussed "incidental switching" at page 742 of that report wherein we noted:

> When the train arrives there may be cars on the track or tracks fully loaded, partly loaded, and empty cars on which loading has not begun, or all of the cars may be loaded and ready to move. The train may have empty cars to replenish the track. The usual practice is to pull out the cars ready to move; this may necessitate pulling out all empty and partly loaded cars ahead of the out-bound cars, and replacing them together with the in-bound cars. In this operation it is sometimes necessary to realine (sic) the cars for convenience in loading or unloading, in the same manner as cars are realined for loading or unloading less-than-carload freight at railroad freight houses or platforms and on team tracks. The realinement (sic) of the cars depends in many instances on the manner in which the train crew performs the switching operation, and to replace the cars in exactly the same location would often necessitate an additional switch movement.

> This [switching] practice has prevailed on respondents' lines without specific tariff authority, and has been considered by them to be a necessary operating practice as distinguished from a switch movement solely for the shippers' convenience, for which a charge is provided for by tariff publication. Hence the practice has been considered a part of their ordinary duty in efficient and economical handling of traffic.

In *Spencer Kellog & Sons, Inc., Terminal Service*, 262 I.C.C. 205, 212 (1945), we recognized:

> A carrier may not, however, perform any special or preferred service for a shipper or, when placement has once been made, perform any additional service not incident to its other necessary operations without compensation in addition to that included in the line-haul rates.

Those cases, when read in conjunction with one another, show that when the subsequent replacement of a partially loaded car to a particular spot during the removal or replacement of empty cars is immaterial to the consignee and may be performed by the carrier in a manner which is convenient to the carrier or which facilitates the carrier's other switching operation, it is permissible for the carrier to make such replacement without an additional charge. But where respotting is to a particular spot chosen by the receiver, it is an additional service performed for the receiver and can be done by the carrier only for additional compensation where, as here, the requested respottings involve significant additional movements. In this case, Erie does not charge for respotting within a single bay pursuant to shipper's request, but only imposes a charge when the respotting requested involves a movement to a different bay, which appears to be a significant additional movement.

Undoubtedly, the involved switching in the immediate proceeding is performed during the routine removal and replacement of other cars on the track, but Erie has introduced substantial evidence to indicate that the respotting of partially loaded cars from one bay to another bay at the specific request of the complainant consumes time and creates expenses in addition to those it would otherwise incur in respotting the car to its original bay or a spot convenient for the carrier. It has shown that the involved switching cannot be performed by it at its normal operating convenience, that it does not promote operating efficiencies for the carrier, and that the additional time and expense incurred by honoring complainant's request cannot otherwise be avoided in the routine removal or replacement of other cars. Moreover, it has shown that the specific requests by Ford for a particular bay are used by Ford to promote handling and unloading efficiencies particularly for cars loaded with mixed parts.

We think these facts support a finding that the involved bay-to-bay and mat-to-bay switching involved herein is a service performed for the convenience of the complainant and not the carrier. As such, it is a service performed for the complainant beyond the line-haul obligation of the carrier, and the carrier is entitled to additional compensation. Similarly, we think that under the circumstances, defendant's use of the movable bridges as lines of delineation for the purposes of applying charges under Item 1220-A of Tariff 5103, ICC 125 (Erie Series), provides a workable solution to the problem herein since the defendant can apparently accommodate cars anywhere within a particular bay and respot cars incidental to the removal or replacement of other cars on the track without incurring substantial additional operational difficulties.

Therefore, we find that the involved switch movements are additional services for the sole benefit of the consignee and are beyond the carrier's line-haul obligation, and the carrier was correct in assessing a charge in addition to the line-haul rate.

The Administrative Law Judge relied on *Wickwire Bros., Inc., Terminal Allowance,* 274 I.C.C. 307 (1949), for the proposition that the track, platform, or zone served is what governs with respect to a definition of the word "location" as that word is used in defendant's Item 1220-A of Tariff 5103, ICC 125 (Erie Series). However, that case dealt with the initial spotting of lines of cars, whereas in the instant proceeding, we are concerned with respotting specific cars that were temporarily removed from their initial spots, and it is distinguishable on that basis.

Therefore, we conclude that the Administrative Law Judge erred in treating the entire unloading track as "location" for the purposes of applying charges under Erie's tariff Item 1220-A of Tariff 5103, ICC 125 (Erie Series), and in finding the switching charges, even if applicable, to be unjust and unreasonable since the level of the charge is not in issue.

We find that the defendant's additional switching charges assessed for respotting of partially loaded or unloaded freight cars at complainant's Mahwah, N. J., plant are applicable and not shown to be unjust and unreasonable.

We further find that this decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

***It is ordered*, That the complaint be, and it is hereby, dismissed.**

APPENDIX

Pertinent tariff items from TLCTR local freight tariff 804, ICC C-853

ITEM 200

APPLICATION OF RULES GOVERNING RECEIPT AND DELIVERY OF CARS OF FREIGHT

Rule 1. Except as otherwise provided in Rule 3 and except as otherwise provided in other tariffs, cars of freight moving at carload rates including switching rates and cars of less carload or any quantity freight subject to rules governing the handling of ferry or trap cars as published in tariffs lawfully on file with the Interstate Commerce Commission and State Commissions, will be delivered on and removed from privately owned side tracks or industrial tracks near and connecting with the carrier's tracks without any additional charge, provided there are no conditions which make it unsafe for the carrier's locomotives to operate over such tracks, or that prevent the carrier from receiving or delivering cars at its ordinary operating convenience. (See Notes 2 and 3 of Item 210) (See Exception 1).

Rule 2. Except as otherwise provided in Rule 3, cars covered by Rule 1 will be received and delivered at loading and unloading locations on tracks designated by the industry within the industrial plant site without any additional charge when that service can be ordinarily performed in continuous movement at the carrier's ordinary operating convenience, within the meaning of these terms as defined in Notes 1, 2 and 3 of Item 210, provided the locomotives in general use for switching in the vicinity of the plant site can safely operate over the tracks within the plant site.

Rule 3. When receipt or delivery of a car or cars as provided in Rules 1 and 2 cannot be accomplished in continuous movement at the carrier's ordinary operating convenience because of interruption, interference or any other condition caused by the shipper or consignee, the carrier will arrange for receipt or delivery under the following provisions (See Note 3 of Item 210):

A. If it appears that the delay will be of a temporary nature the locomotive will be held at the nearest available location and the service completed when conditions permit. For delay to the locomotive when so held, a charge of $3.29 for each five minutes or fraction thereof in excess of 30 minutes will be assessed, which charge will be in addition to the published rate or rates.

Charges will be assessed in accordance with the next preceding paragraph when delays encountered during a locomotive trick or shift aggregate more than 30 minutes.

B. If, after a reasonable period of delay, the obstruction or condition preventing completion of service has not been removed or eliminated the carrier may, at its option, withdraw its locomotive and place the car or cars on a hold or other available track or tracks within or without, the industry plant site. Charges for the delay encountered shall be computed in accordance with paragraph A. Subsequent movement by carrier locomotive of the car or cars from the hold or other track or tracks to actual point of delivery will be subject to a charge of $14.90 per car.

C. For the purpose of applying the provisions of paragraphs A and B, time shall commence to run from the minute the conductor determines that the shipper or consignee is unable to accept service.

EXCEPTION

1. Will not apply for account of the PONY on switching rates and less carload or any quantity freight handled in trap or ferry car service.

ITEM 210-A

EXPLANATION OF NOTES REFERRED TO IN ITEM 200

1. "Continuous movement" means a movement between the carrier's tracks and the loading or unloading locations, a hold track or tracks, or other place where cars are received or delivered without any delay or any suspension or break in time, or continuity of the movement, due to any circumstances or condition for which the industry is directly responsible.
2. "Ordinary operating convenience" means the time selected by the carrier when it is most advantageous to the carrier, in relation to its coordinated and harmonious switching activities in a particular switching zone, when the terminal services are performed by switching locomotives, or at the time the train arrives at the plant site when the terminal services are performed by road-haul locomotives. Ordinarily it contemplates only one switch a day except when additional switches are made by the carrier in its own or the public interest, as distinguished from the industry's interest, to secure the prompt release of equipment or facilities, or when necessitated by the volume of traffic. Movements to, from or within the plant site at other times at the request of the industry or to meet the requirements of industrial operations are not at the carrier's ordinary operating convenience.
3. The operations named below where performed by the carrier as necessary incidents to the placement and removal of cars moving at published carload rates, shall not be deemed (a) to break the "continuous movement," (b) to be in excess of the "ordinary operating convenience" of the carrier, (c) to be an "interruption, interference or any other condition caused by the shipper or consignee," nor (d) to be a "circumstance or condition for which the industry is directly responsible" as those terms are used in these rules:

A. ◆ The temporary holding of outbound cars on tracks of the industry for instructions from the shipper or of inbound cars on tracks of the carrier or industry for instructions from the receiver that unloads the car.

B. The removal and replacement of cars empty, partly loaded, partly unloaded, or loaded when incidental to the placement or removal of other cars.

C. The service of securing the weight of freight, irrespective of the ownership of the scales used, where the weights obtained are used by the carrier for billing purposes.

D. Classifying, sorting and lining up cars on industry or carrier tracks.

E. Delay and interruption resulting from the operations of a common carrier by rail on industry tracks.

F. Operations performed in providing a service for which a separate charge is authorized pursuant to a published tariff.

EX PARTE NO. 278[1]

EQUAL OPPORTUNITY IN SURFACE TRANSPORTATION

Decided February 3, 1977

Upon investigation into (a) the employment practices of, and minority participation within, the surface transportation industry subject to economic regulation by this Commission pursuant to the provisions of the Interstate Commerce Act, (b) that industry's compliance with applicable civil rights statutes and Executive orders, and (c) the proper role to be assumed by this Commission in regard to these matters, found:

(1) That unlawful discriminatory employment practices do exist in the surface transportation industry subject to our jurisdiction as in other industries not within the purview of our regulatory authority, but visible efforts are being made by the industry itself to correct these problems.

(2) That the Interstate Commerce Commission, pursuant to the principles set forth in *NAACP v. FPC*, 425 U.S. 662 (1976), has jurisdiction (a) to disallow any quantifiable costs demonstrably the product of discriminatory employment practices as unnecessary costs which may not be included as justification for rate increases; and (b) to consider the consequences of employment discrimination, as a factor, in licensing fitness, and other areas, but only if the discriminating activity impacts on the regulatee's regulated activities.

(3) That this Commission's Bureau of Accounts shall, and hereby is directed to, notify all carriers, as soon as practicable, of the appropriate accounting for such costs.

(4) That this Commission's range of authority in the area of employment discrimination involves more than specifically quantifiable costs, but does not extend beyond the scope of the regulatee's regulated activity.

(5) That the Commission's existing rules and regulations appear adequate, at this time, for the bringing of matters involving employment discrimination relevant to our proceedings to the Commission's attention for appropriate consideration and, therefore, neither the adoption of those proposed rules which are within our power to adopt, nor the promulgation of any new rules is necessary.

(6) That the Commission will handle issues involving employment discrimination on a case-by-case basis until we gain the experience and a need for additional rules presents itself.

(7) That the Commission should continue to assist and participate in programs designed to enhance and encourage greater female, minority, and small business concerns participation in surface transportation subject to our jurisdiction.

(8) That the petition proceeding in No. MC-C-7255 should be dismissed.

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[1] This report also embraces No. MC-C-7255, Petition for Rulemaking Proceeding Relative to Employment Practices of Motor Carriers.

(9) That since no new rules are adopted herein or any other good cause shown why this proceeding should be held open for further comment, the proceeding should be discontinued.

(10) That this decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

Peter T. Beardsley, Donald S. Beattie, James R. Boyd, R. Edwin Brady, Nelson J. Cooney, Hollis G. Duensing, William E. Fredenberger, Jr., William J. Hickey, Edward J. Hickey, Jr., Ernest H. Land, William M. Moloney, Normal Powell, G. M. Rebman, Roland Rice, Richard J. Riddick, Lester P. Schoene, J. Taylor Soop, Clarence William Vandegrift, Charles A. Webb, Martin A. Weissert, and *Alan F. Wohlstetter* for carriers and carrier associations.

John E. Bishop, David Bonderman, Elizabeth M. Eckerson, Velta L. Erdmanis, P. W. Ewing, Jack Greenberg, Jim Heidelberg, Ed Idar, Jr., James A. Kirk, June Galvin Lewis, Raymond B. Marain, Ralph B. Matthews, James M. Nebrit III, Mario Obledo, Frank Pohlhaus, Charles S. Ralston, Joseph L. Rauh, Jr., Reuben B. Robertson III, William L. Robinson, Albert Rosenthal, Dovey Roundtree, Theresa Jane Ste. Marie, Eileen Schneider, and *William L. Taylor* for participating individuals and groups.

Richard F. Lally and *J. Thomas Tidd* for the U.S. Department of Transportation.

Clarence H. Featherson for the Office of Equal Employment Compliance of the U.S. Postal Service.

John L. Wilks for the Office of Federal Contract Compliance of the U.S. Department of Labor.

John L. Jenkins for the Office of Minority Business Enterprise of the U.S. Department of Commerce.

William H. Brown III, David Copus, Gerald D. Letwin, and *George P. Sape* for the Equal Employment Opportunity Commission.

William B. Fenton and *David L. Norman* for the U.S. Department of Justice.

REPORT OF THE COMMISSION

BY THE COMMISSION:

We instituted this proceeding to consider what, if any, steps we might lawfully take in an effort to achieve an effective and practical approach to a civil rights problem of vital concern to the people of this Nation—the elimination from the surface transportation industry we regulate of employment and other discrimination based upon race, color, sex, religion, or national origin. In this endeavor, we shall determine whether and to what extent such discrimination exists and is violative of the law, and whether we have the jurisdiction to deal with any such discrimination as may be found present, through the promulgation of appropriate regulations or otherwise.

Our inquiry includes not only railroads, motor and water carriers, brokers, and freight forwarders, but also express and pipeline companies and rate bureaus subject to our regulatory control. After the disposition of certain preliminary matters and a discussion of the positions of the parties, the format of our report will be as follows: first, we shall discuss the nature and extent of the problem and this Commission's historical approach toward discrimination in services and facilities of those subject to our jurisdiction; second, we shall fully explore the reach of our statutory authority to deal with civil rights matters in areas *other* than the provision of services and facilities; and, finally, we shall summarize our conclusions and indicate our findings.

This report shall not single out any person or mode of transportation—neither the motor carriers, the railroads, nor others—as being worse or better than others in the area of employment discrimination. Indeed, our consideration here of only that portion of the transportation industry which we regulate is the result of the legal limits of our statutory authority and stems not from any conviction that the regulated surface transportation industry is significantly different in this regard from other major American businesses. We are instead persuaded that the transportation industry is taking steps to comply with the requirements of the governing civil rights laws.

Finally, before proceeding further into the report, we believe that the parties should know why our decision has been delayed so long. As the Commission's report was being drafted, the Federal Power Commission issued a decision in a proceeding where the issues were virtually the same as in the instant proceeding. The FPC found that it lacked jurisdiction to take affirmative action against the companies it regulates in order to prohibit employment discrimination. That decision was appealed to the Supreme Court and will be discussed in much greater detail later in this report. We felt that it would be inadvisable for us to issue a decision while the FPC appeal was pending. As expected, the Supreme Court's decision in the FPC case is dispositive of many of the issues herein.

PRELIMINARY MATTERS

In No. MC-C-7255, Eileen M. Schneider and Reuben B. Robertson III request us to institute a rulemaking proceeding looking toward the adoption of proposed regulations regarding equal employment opportunity in the motor carrier industry, the rigorous enforcement of public policies against unlawful employment discrimination, and the revocation of all certificates and permits of those motor carriers whose employment practices cannot be shown to be nondiscriminatory. On November 29, 1972, Ms. Schneider filed a petition seeking consolidation of No. MC-C-7255 with the instant proceeding. She asserts that while this Commission might well prefer to confront certain issues on its own (in this proceeding), rather than on terms submitted by private citizens (in No. MC-C-7255), it does not appear that we are free to "engage in such administrative self-indulgence." We believe, however, that no further need exists for continuation of the latter proceeding. The issues involved in this general investigation and rulemaking proceeding, which is an outgrowth of a staff study commenced prior to the filing of the Schneider-Robertson petition, are broader in scope than those presented in No. MC-C-7255; they encompass not only motor carriers but all modes and aspects of surface transportation subject to our jurisdiction. Petitioners in No. MC-C-7255 are parties in the instant proceeding, and they too have recognized the identity of issues by submitting as their initial representation a pleading virtually identifical with their initial petition in No. MC-C-7255. Because all issues presented for consideration in their petition are or will be decided herein, and because all parties to No. MC-C-7255 are parties here, we are unable to see how petitioners could be adversely affected by discontinuance of the petition proceeding. The request for consolidation is, therefore, denied, and the proceeding in No. MC-C-7255 is hereby dismissed.[2]

The Railway Labor Executives Association, Congress of Railway Unions, and the Association of American Railroads, all assert that the issue of this Commission's jurisdiction in this matter is preliminary to the consideration of all other questions; and that, therefore, the jurisdictional issue should be severed from the remainder of the proceeding and decided first. Obviously, a finding of jurisdiction would be a prerequisite to the issuance by this

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[2] Nor does this action in any way limit the right of appeal of petitioners Schneider and Robertson. The same appeal procedures are available in both instances.

Commission of any complementary rules and regulations. But, in view of our ultimate conclusions herein, severance of that issue is not warranted, and the above requests are hereby denied.

The National Association for the Advancement of Colored People (N.A.A.C.P.) Legal Defense Fund has moved to strike a portion of the reply statement of the National Association of Motor Bus Owners (NAMBO). NAMBO's statement, discussed in greater detail infra, suggests that it was improper for the Legal Defense Fund to refer to a case which the latter knew to have been dismissed. We believe that the Legal Defense Fund's explanation of why it cited the case establishes that such citation was proper. We also believe that NAMBO's statements may have been justified in their context. The motion is denied.

REPRESENTATIONS

We are genuinely gratified by the breadth of responsible participation in this proceeding. More than 100 individuals, corporations, organizations, and governmental agencies initially indicated their intention to participate. In the actual filing of pleadings, that number has decreased substantially, but the statements that we have received represent a broad spectrum of public and private interests. All representations are digested in appendix I to this report. The contents of that digest, both as to factual statements and argument, represent the point of view of the submitting party, and are not to be construed as findings of this Commission except as specifically noted in the body of this report.

Initial representations were received from nine individuals, two common carriers, seven agencies of the Federal Government, eight organizations representing carriers or their employees, and four civil rights organizations. The statements of these parties appear to fall into generally divisible groupings: the carriers, the organizations representing carriers and their employees, and one individual assert that this Commission has no jurisdiction to regulate equal employment opportunity; and that, even if such jurisdiction is found to exist, it should not be exercised. Five of the individuals have submitted statements regarding their actual experience with or knowledge of discriminatory employment practices by carriers or a carrier-related group. The remaining representations discuss statistical evidence regarding discrimination in the industry, argue that this Commission has the statutory power and the constitutional duty to protect individual employees against the discriminatory practices of regulated carriers, and lastly propose rules which would implement this policy.

A total of seven reply representations have also been submitted—one by a motor carrier, three by carrier organizations, two by governmental agencies, and a joint statement by three individuals. The motor carriers and the carrier organizations assert that proponents of equal employment opportunity regulation have failed to establish this Commission's jurisdiction to deal with that subject; that virtually all cases and statutes cited by those proponents refer to prohibitions against discrimination in the services and facilities of carriers, but not in their internal employment practices; that the Commission has no constitutional obligation to act; and that the regulations proposed would, if adopted, be extremely harmful to economical and efficient transportation operations and services. In addition, the American Trucking Associations, Inc. (ATA), has submitted a statement by its Industrial Relations Department showing the programs of, and advances made by, the motor common carrier industry in the area of equal employment opportunity. The governmental agencies and the three individual proponents of regulation maintain that this Commission has both the power and duty to act. The individuals list numerous cases of alleged employment discrimination pending (at time of filing) against regulated carriers. The Equal Employment Opportunity Commission (EEOC) notes that the courts have held that Government can regulate both services *and* employment practices of companies, when there is sufficient "State" action for the Government to become involved at all.

THE PROBLEM

The surface transportation industry subject to our regulation bears a heavy admixture of the general society's problems. It appears that minority group members participate in the ownership and management of all types of carriers only to a very limited extent. A relative handful of blacks and Spanish-Americans hold motor carrier or broker authority, while we know of no other direct minority control or operation of any other mode of transportation.[3] Employment of minorities in all transport modes also appears to be low in relation to the national population statistics, and this is especially true at the management level and in a number of the more prestigious blue-collar jobs. While this report will give detailed consideration to employment discrimination in the motor carrier industry, we wish to emphasize strongly that these figures appear to be representative of all carriers and should not be taken as an attempt to single out the motor carrier industry for special or individual attention. Rather, the information concerning motor carriers is available in greater detail, and many of the parties have directed their statements exclusively to that industry.

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[3] Actual numbers cannot be known because records are not maintained as to the racial, religious, or ethnic background regarding the ownership of the carriers we regulate.

EEOC requires the filing (on Form EEO-1) of information concerning minority (classified as Negroes, Spanish-surnamed Americans, Orientals, and American Indians), and female representation at all levels of employment. All employers who deal in interstate commerce and employ 100 or more persons must file this form.[4]

The report of the survey resulting from the filing of Form EEO-1 shows that in 1969 minority group members comprised only 9.1 percent of all employees of local and long-distance trucking companies, whereas they accounted for 13.6 percent of the total American work force. Minority group members also reportedly comprised only 3.9 percent of all white-collar workers in the motor carrier industry, as compared to 6.8 percent of all reporting American industries. Of those minority white-collar workers, approximately 3,284 (or 75 percent) were employed as clerks, while minority group members represented less than 2 percent of the sales force. In the blue-collar field, 10.5 percent of the employees of motor carriers were members of minority groups, as compared with 17.8 percent for industry generally. The larger percentage of minority blue-collar workers in the trucking industry appear to be employed as laborers and service workers, and relatively few as long-distance operators (drivers) and craftsmen.

An extensive study by the Wharton School of Finance and Commerce, University of Pennsylvania, entitled "The Negro in the

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[4] In the survey resulting from the filing of Form EEO-1, that Commission has categorized all respondents according to the Standard Industrial Classification Code (U.S. Government Printing Office, 1967). Code 421, under the heading "Truck, Local, and Long Distance," is the source of most of the data set forth in this discussion. Clearly, these figures are not totally accurate because a number of *unregulated* carriers of freight employing more than 100 persons have been included and many regulated carriers are not represented. These include all motorbus companies, and those regulated trucking companies with fewer than 100 employees. As to the latter, it has been estimated that this represents approximately one-third of all employees in this sector of the industry. Nevertheless, these figures appear to be representative of conditions existing throughout all of surface transportation and while the numbers might be somewhat inexact, their impact is undisputed. The figures used are for the year 1969 except where otherwise noted. Comparisons are with the overall summary for *all* reporting industries.

Trucking Industry," by Richard D. Leone (University of Pennsylvania Press, 1970), has been quite revealing. That study notes that in a survey of 17 of the largest intercity motor carriers, there were 10,639 over-the-road drivers employed, but only 71 (or 0.7 percent) of these were black. The Wharton study also notes that of the few black drivers found, almost all were local city drivers. Information received from the Contract Compliance Division of the U.S. Postal Service[5] further verifies the relatively low minority employment statistics of truckers holding Government contracts. EEOC statistics for 1970 show that 68 percent of all reporting companies had fewer than 1 percent black white-collar workers. Of 20 large trucking companies, total black participation was 5.5 percent, lower than industry generally, and also lower than the trucking industry average. Driving positions, which are the most prestigious and best paying blue-collar jobs in the industry, are not occupied by blacks to any appreciable extent, either with respect to over-the-road operations or with respect to local operations. Most black employees are assigned such menial, low-paying, more physically strenuous, and low-status jobs, as dockworkers, greasemen, night watchmen, and janitors.

A wealth of additional data describing the scope and extent of minority and female employment in surface transportation has been submitted by the parties, especially the Legal Defense Fund, Eileen Schneider et al., and the EEOC. The above represents only a brief summary of their statistics, which are digested and discussed in great detail in appendix I to this report. The pleadings themselves contain an even more extensive treatment of these figures, and we would direct anyone interested in such detailed analysis to the pleadings of these parties, especially that of EEOC. The following conclusions are apparent: The number of minority group members employed in the transportation industry is small in comparison with national figures for all industry. Of those that are hired, few are employed as white-collar workers. To the limited extent that there are minority white-collar workers, extremely few are in positions of responsbility. Minority group workers have been assigned to the least prestigious, least skilled, and lowest paying blue-collar jobs. They have been especially underrepresented in driving jobs, and extremely so in the prestigious, well-paying road driver positions.

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[5] Effective April 15, 1976, jurisdiction over contract compliance among motor carriers was transferred to General Services Administration. It is now known as the Contract Compliance Division, Office of General Counsel.

Specific practices, some already proven in court and found unlawful and others merely alleged and awaiting judicial determination as to their legality, further emphasize the nature and scope of the discriminatory employment posture of the motor carrier industry. One unlawful practice is the so-called no-transfer policy which prohibits transfers from one job to another within a company. In some firms, transfers are permitted, but only after the employee resigns from his present job, relinquishes all seniority and other benefits, and applies for the better position as a new employee, without any guaranty of getting the new position, or getting back the old one. This policy often has been strictly applied when city drivers seek transfer to over-the-road driving positions. In *Jones* v. *Leeway Motor Freight, Inc.*, 431 F. 2d 245 (10th Cir. 1970), cert. denied 401 U.S. 954 (1971); and *Bing* v. *Roadway Express*, 444 F. 2d 687 (5th Cir. 1971), the above-described policies were held to be discriminatory and unlawful. Other practices include the outright refusal to hire blacks, and the refusal even to accept applications from prospective black employees; refusal to promote more experienced black employees to higher paying jobs while promoting newly hired white employees instead; segregation of a carrier's departments by race, with no black supervisors and no black women employees, and with seniority and promotion policies that have the effect of depriving black employees of opportunity for advancement; perpetuating separate lines of progression based upon race; refusal to pay blacks the same wages as whites for similar work; refusal to admit blacks to an on-the-job apprenticeship program; conditioning promotion of black employees upon successfully passing a test that is not required of white employees for similar positions; requiring blacks to learn new jobs on their own time, but promoting whites without any training; offering certain opportunities only to white drivers, and refusing route requests of black drivers and awarding preferred routes to whites who do not even request them; and taking retaliatory actions against employees who do complain to the authorities. These practices all tend to exclude minorities from employment within the industry, and to lock those that are already employed in the industry into positions and groupings which were created as a result of discriminatory hiring and promotion policies in the past.

We have commented in this section of our report principally on the discrimination and disadvantage suffered by minority group members. We wish to stress, however, that much of what we say in this regard applies equally to discrimination against women.[6] Using again the motor carrier industry as generally representative of the situation in all surface transportation, the figures reported by EEOC show that men outnumber women employees by more than 10 to 1. Moreover, in the motor industry, more than 93 percent of all females are employed as clerical workers, whereas the corresponding figure for industry generally is less than 40 percent. A male party to this proceeding notes that one motor carrier continues unlawfully to advertise in a sex-segregated employment newspaper column. Another notes the existence of separate retirement programs for male and female railroad employees. The specific experiences related by two female participants are particularly illuminating. These women are both employed by the same railroad association, which is controlled and financed by regulated carriers in accordance with an agreement approved by this Commission. During their employment (which when combined totals 58 years) no female has ever had or been offered an executive or official position in that association. It is asserted that these women have been refused promotions for reasons that reportedly were overlooked when the association found males to fill the positions. Complaints filed with the EEOC and State agencies have met with little actual change, and these parties continue to be passed over for promotions and, in fact, have had work taken away from them. These women believe that only an agency with the power to act effectively and affirmatively can bring about true equality of opportunity. It must be noted in this regard, however, that EEOC is now empowered to sue in its own name employers allegedly practicing discrimination.

Discrimination has usually been assumed to be responsible for at least some of the female nonparticipation, especially in certain white-collar positions. While other explanations for this may exist, nevertheless, efforts to assure equal employment opportunity to all should apply as strongly to the rights of women as it does to the rights of minority group members. The same may be said for ethnic, religious, and other minorities.

Furthermore, and notwithstanding the contentions of several motor carrier association respondents that neither they nor their members practice discrimination, the statistics and facts speak for themselves. It is equally true, however, that conditions within the industry have improved and that various Government agencies as well as private organizations are making efforts to further that improvement. The Association of American Railroads (AAR) states that it has cooperated with various levels of Government and has instituted positive action through the nationwide Railroad Committee on Equal Employment Opportunity, which has served as a forum for Government officials to appear and give direction to the industry. Federal officials have regarded this Committee as a model, and have urged other industries to establish similar committees. While substantial progress has been made, AAR recognizes that opportunity for further progress exists.

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[6] While our consideration herein is directed solely to discrimination against females and minorities, we take official notice of the decision in *Hodgson* v. *Greyhound Lines, Inc.*, 354 F. Supp. 230 (N.D. Ill. E.D. 1973), rev'd, 499 F. 2d 859 (7th Cir. 1974), cert. denied, *Brennan* v. *Greyhound Lines, Inc.*, 95 S. Ct. 805 (1975), involving alleged violations of the Age Discrimination in Employment Act of 1967, and encourage all members of the surface transportation industry to comply with all antidiscrimination legislation.

Other programs have been instituted. The Chicago Conference on Religion and Race has conducted successful classes for the training of minority over-the-road drivers and dockworkers. Local schools in Cleveland, Ohio, and Indianapolis, Ind., have given courses in driver training; and of 102 graduates, 50 percent were black and 5 were female. The latter program was the vanguard of a national Truck Driver Training Program. The Joint Council of Teamsters, No. 42, in cooperation with the Labor Department and the Institute of Industrial Relations at U.C.L.A., has formed the Transportation Opportunity Program (TOP). TOP offers at its two facilities courses in heavy-duty truck driving, and other courses for dockworkers, warehousemen, hostlers, heavy-duty servicemen, and other trades related to the industry. TOP trainees are 42 percent black and 37 percent Spanish-surnamed Americans. Gateway Transportation, of La Crosse, Wis., while only 4.9 percent of its employees admittedly are minority members, has on its own initiative put into effect a 2-year program aimed at raising this figure to 10 percent. See "Transportation and 'Social Activism,'" *Transportation and Distribution Management*, March 1971. In addition, ATA conducts a broad informational program for motor carriers and has entered negotiations with the Teamsters Union and the EEOC seeking ways to remove inhibitions to equal employment opportunity in the trucking industry. Other statistics reveal that there has been some overall industry improvement. In September 1970, 9.4 percent of all employees in the trucking industry were minority group members, and 12.5 percent of all 1969 hirings in the industry came from minority groups. These represent significant increases over earlier figures.

A major and more recent development having pervasive effect on minority employment in the trucking industry has resulted from a court action noted in note 2 to appendix I that was instituted by the Civil Rights Division of the Department of Justice. It involves an agreement which calls for the adoption of "hiring goals" under which between 33 and 50 percent of new workers of the approximately 349 trucking firms involved would be blacks or persons of Spanish-surname. The suit did not cover trucking firms with fewer than 100 employees. The trucking companies involved employ more than 225,000 workers, including more than 50,000 long-haul or over-the-road drivers. It is estimated that approximately 15,000 minority workers would be affected by this agreement. Specifically, under the terms of the agreement the trucking firms pledged themselves to a goal of filling 50 percent of all present vacancies and new jobs with blacks and Spanish-surname applicants in communities where those groups make up more than 25 percent of the working-age population. Where members of these minority groups constitute less than 25 percent of the work force, the hiring goal will be 33 1/3 percent. In all cases, compliance is subject to the number of qualified minority applicants in the local labor market. Any trucking firm which cannot find enough minority workers qualified to be road drivers will establish a training program for that purpose, alone or in combination with other employers, or will support an existing training school. The hiring goals will remain in effect for every employer who signs the consent decree until its entire work force includes a suitable percentage of blacks and Spanish-surname workers. Reportedly, the vast majority of those firms involved have already joined in the consent decree. More recently in ***Franks*** v. ***Bowman Transportation Co.***, 424 U.S. 747 (1976), the Supreme Court took further affirmative and decisive action in ameliorating the effects of past racial discrimination in employment in holding that retroactive seniority relief may be appropriate to victims of hiring discrimination in addition to the traditional reliefs of hiring and monetary award. In short, the Court reasoned that the seniority remedy does not concern only the "make-whole" purposes of Title VII of the Civil Rights Act of 1964, but cuts to the very heart of Title VII's primary objective of eradicating present and future discrimination in a way that backpay, for example, can never do.[7] It is clear that the Court has gone far towards the attainment of complete relief in this area.

The Labor Department, Office of Contract Compliance Programs has published revised requirements, effective February 17, 1977, that motor carriers with 50 employees or more and $50,000 or more in cumulated Government bills of lading in a 12-month period must develop written affirmative action compliance programs (January 18, 1977, Federal Register). This action, if affirmed by the courts, should substantially increase the number of carriers who must establish written goals and timetables for hiring and promoting minorities and women.

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[7] *Franks* v. *Bowman Transportation Co., supra*, 768, footnote 28.

Just as surface transportation shares the social problems today confronting the people of our Nation, it has an important stake in the future of our country and, in this land of opportunities, offers minorities a wide variety of employment and other opportunities. Projections indicate that our population will expand to approximately 235 million in 1980, and it is evident that the need for goods and services, including transportation, will increase commensurately. The labor force will have climbed by one-fifth to over 100 million workers, and will include 26 million young workers, ages 25 to 34; and employment will have continued its shift toward the service industries, including transportation and Government. In 1968 there were 2,674,500 persons employed in transportation, and it is predicted that this figure will reach 2,900,000 in 1980. The following figures relate to specific areas of transportation:

	Employment 1968	Estimated employment 1980
Railroads	661,900	500,000
Motor carriers:		
Freight	1,046,100	1,235,000
Passengers	281,500	295,000
Air carriers	328,800	480,000
Pipelines	18,800	15,000
Water carriers	337,400	375,000
Total	2,674,500	2,900,000

Railroad employment declines were expected to slow, absent unusual dislocations that might be generated by bankruptcies, while substantial increases are anticipated in employment in motor and air transportation. More salesmen will probably be required because of the increased competition from other modes of transportation, particularly air. As the industry grows, the need for clerical jobs will probably expand even though the use of computers is likely to slow this increase somewhat. As more people move from the cities to the suburbs, the need for local truck drivers also will probably increase. Statistics indicate that large numbers of truck and bus driver jobs are opening up each year. Thus, the motor carrier industry should be a fertile field for opportunities for minority group members. Most carriers have their terminals in cities, where there are larger proportions of minorities available for employment. And, to an extent greater than in many other industries, a college or a higher education is not required in order to perform many of the jobs in the motor carrier industry. This is true even of some of the higher paying positions, such as drivers. The bountiful supply of jobs that will be available in the motor carrier sector of the transportation industry should be an excellent source of minority employment over the next decade.

The completion of the Interstate Highway System will provide over 40,000 miles of modern, high-speed, limited-access road efficiently linking together all major urban and industrial concentrations. It will save commercial vehicle operators about $3 billion a year. In 1966, truck registrations totaled 14.7 million, a growth of nearly 50 percent in 10 years. By 1973, truck registration had already increased 50 percent from 1966 to 21.4 million. Average tonnage per load has risen 16 percent in the past 10 years, and truck tonnage is expected to rise another 50 percent in the next 10 years. Assuming continuations of these present ratios, national expenditures for freight transportation services will range in the vicinity of $100 billion in 1980. Over 70 percent of that expenditure will be made for trucking services. That certainly represents sufficient revenues for existing carriers as well as the nearly 500 new ones entering the field each year. Motor transportation thus constitutes a fertile field of investment for the entrepreneur with his eyes on the future. It will take many men and women, of all races, to meet and assist this growth. Our hope is that each will have a fair opportunity to participate.

HISTORICAL BACKGROUND

This Commission was created by act of Congress on February 4, 1887 (24 Stat. 380), and was empowered primarily to regulate rail transportation within the United States. Historically, the regulation of transportation, an essential service industry, may have been principally intended to control carrier monopolies and destructive competitive practices. But other purposes also are evident. The development and preservation of a national system of public transportation, available to all without discrimination, became the bedrock of Federal transportation regulation in the United States. The Interstate Commerce Act thus specifically declares it to be unlawful for a common carrier to make, give, or cause any undue or unreasonable preference or advantage to any person, in any respect whatsoever; or to subject any person to undue or unreasonable prejudice or disadvantage.

In a number of earlier cases, for example, *Councill* v. *Western & Atlantic R. R. Co.*, 1 I.C.C. 339 (1887), and *Heard* v. *Georgia R. R. Co.*, 1 I.C.C. 428 (1888), this Commission recognized the common practice of racial discrimination against black rail passengers, and found such policies unlawful and contrary to the meaning and purpose of the Interstate Commerce Act. It sought to devise a policy whereby all passengers would be treated equally, even though they were served separately. The doctrine of "separate but equal" thus arose, and was affirmed by the Supreme Court in *Plessy* v. *Ferguson*, 163 U.S. 537 (1896). That policy thereafter was attacked regularly in this Commission and in the courts. See *Edwards* v. *Nash., Chat. & St. Louis Ry. Co.*, 12 I.C.C. 247 (1907); *Cozart* v. *Southern Ry. Co.*, 16 I.C.C. 226 (1909); *Gaines* v. *Seaboard Air Line Ry.*, 16 I.C.C. 471 (1909); *Louisville & C. Railway Co.* v. *Mississippi*, 133 U.S. 587 (1890); *Hall* v. *DeCuir*, 95 U.S. 485 (1877); *McCabe* v. *A. T. & S. F. Ry. Co.*, 2345 U.S. 151 (1914); and *Chesapeake and Ohio Ry. Co.* v. *Kentucky*, 179 U.S. 388 (1900).

To those blacks who had to abide by the rule of "separate but equal," it was obvious immediately that facilities were in truth not equal. For a long period of time, however, this Commission and the courts believed that the policy could work; and, when blatant cases of inequality and discrimination arose, action was taken to assure substantial equality. See *Mitchell* v. *United States*, 313 U.S. 80 (1941); *Henderson* v. *Southern Ry. Co.*, 258 I.C.C. 413 (1944), on remand 279 I.C.C. 233 (1950), rev'd, *Henderson* v. *United States*, 339 U.S. 816 (1950); *Jackson* v. *Seaboard Air Line Ry. Co.*, 269 I.C.C. 399 (1947); *Mays* v. *Southern Ry. Co.*, 268 I.C.C. 352 (1947); and *Stamps and Powell* v. *Louisville & N. R. Co.*, 269 I.C.C. 789 (1948).

Too slowly, it increasingly became apparent that when separate facilities were maintained they were virtually never equal. Discrimination was shown to exist by such various subtle and not so subtle influences as, for example, the use of signs that directed "colored" persons to use certain clearly inferior facilities, but made no mention of whites, or signs reading "whites only," meaning that blacks were not permitted and had to look elsewhere. See *Stamps* v. *Chicago, R. I. and P. Ry. Co.*, 253 I.C.C. 557 (1942); *Brown* v. *Southern Ry. Co.*, 269 I.C.C. 711 (1948); *Solomon* v. *Pennsylvania R. Co.*, 96 F. Supp. 709 (S.D. N.Y. 1951); *Moore* v. *Atlantic Coast Line R. Co.*, 98 F. Supp. 37 (E.D. Pa. 1951); *Matthews* v. *Southern Ry. System*, 157 F. 2d 609 (D.C. Cir. 1946); and *Charles* v. *Norfolk & Western Ry. Co.*, 188 F. 2d 691 (7th Cir. 1951).

The motor transportation of passengers developed later, but discrimination under the separate-but-equal doctrine in the motorbus industry followed a generally similar pattern. *Simmons* v. *Atlantic Greyhound Corporation*, 75 F. Supp. 166 (W.D. Va. 1947); *Day* v. *Atlantic Greyhound Corporation*, 171 F. 2d 59 (4th Cir. 1948); and *Carolina Coach Co.* v. *Williams*, 207 F. 2d 408 (4th Cir. 1953).

When this Commission ultimately determined, in reliance on *Brown* v. *Board of Education*, 347 U.S. 483 (1954), that the providing of separate but equal facilities was a practice that could be countenanced no longer, the records shows that our policy met with compliance throughout the country by railroads, motor carriers, and others who had practiced such discrimination. See *National Assn. for A.O.C.P.* v. *St. Louis-S. F. Ry. Co.*, 297 I.C.C. 335 (1955); *Baldwin* v. *Morgan*, 287 F. 2d 750 (5th Cir. 1961); *Haley* v. *Wilson Line Operating Co.*, 283 I.C.C. 362 (1951); *Bob-Lo Excursion Co.* v. *Michigan*, 333 U.S. 28 (1947); *Morgan* v. *Virginia*, 328 U.S. 373 (1946); *Lyons* v. *Illinois Greyhound Lines*, 192 F. 2d 533, (7th Cir. 1951); *Chance* v. *Lambeth*, 186 F. 2d 879 (4th Cir. 1951); *Whiteside* v. *Southern Bus Lines, Inc.*, 177 F. 2d 879 (4th Cir. 1951); *Whiteside* v. *Southern Bus Lines, Inc.*, 177 F. 2d 949 (6th Cir. 1949); *Keys* v. *Carolina Coach Co.*, 64 M.C.C. 769 (1955); *Bailey* v. *Patterson*, 369 U.S. 31 (1962); *Gayle* v. *Browder*, 352 U.S. 903 (1956); *Boynton* v. *Virginia*, 364 U.S. 454 (1960); *Bowman* v. *Birmingham Transit Company*, 280 F. 2d 531 (5th Cir. 1960); *Lewis* v. *The Greyhound Corporation*, 199 F. Supp. 210 (M.D. Ala., N.D. 1961); *Williams* v. *Carolina Coach Co.*, 111 F. Supp. 329 (D.C. 1953) affirmed 207 F. 2d 408 (4th Cir. 1953); *United States* v. *Lassiter*, 203 F. Supp. 20 (E.D. La. 1962); *Discrimination—Interstate M. Carriers of Passengers*, 86 M.C.C. 743 (1961); and *State of Georgia* v. *United States*, 201 F. Supp. 813 (N.D. Ga. 1961), affirmed, 371 U.S. 9 (1962). But see *United States* v. *City of Jackson, Mississippi*, 206 F. Supp. 45 (S.D. Miss. 1962).

Thus, we believe it fair to say that in the early days of regulation this Commission went to great lengths in attempting, within the confines of the prevailing social and legal philosophy, to end racial discrimination in services, and facilities in the transportation industry. We are proud of the fact that our policy, once plainly enunciated and firmly established, has resulted in prompt and effective compliance by all phases of the industry. Subsequently, over the years complaints alleging racial discrimination in services and facilities have been virtually nonexistent. Nevertheless, and despite the fact that to a meaningful extent this Commission has been the characteristic instrument of reform in the transportation industry respecting discriminatory practices in services and facilities, we are reminded, often by firm judicial and congressional expressions, that our regulatory jurisdiction is not all-encompassing, but rather is limited by the statutes from which we derive our powers. It is in this light that we must approach the present question as to the extent of our statutory jurisdiction to consider discriminatory employment practices in the industry which we are congressionally mandated to regulate in the public interest.

JURISDICTION

Notwithstanding our vital concern for all human rights and despite our past successes in the eradication of service discrimination from surface transportation, we are met at the threshold of our present inquiry with serious and pervasive questions as to our statutory power to address the problems of discriminatory employment practices and lack of equal opportunity, to the extent it may now exist, in the industry we regulate. This essential jurisdictional question is, in reality, composed of five subsidiary issues, each of which must be separately considered and disposed, of affirmatively preliminary to any effective implementation of our stated interest in promoting true equality of opportunity in transportation. These subsidiary issues are as follow: (1) whether this Commission is authorized, under the Interstate Commerce Act or otherwise, to exercise jurisdiction over equal employment opportunity; (2) if so, whether this jurisdiction has since been vested exclusively in the Equal Employment Opportunity Commission, the Department of Justice, the Office of Federal Contract Compliance, and the United States Commission on Civil Rights; (3) whether this Commission has an obligation to enforce equal opportunity in employment and otherwise in the industry which it regulates; (4) whether the added burdens that adoption of rules and regulations at this time would place on this Commission and the carriers are necessary and in the public interest; and (5) whether this Commission's jurisdiction requires the promulgation of appropriate rules and regulations.

Our assessment of the place where this Commission as an administrative agency fits into the broader scheme of things might be enlightened initially by a repeated observation well and ably summarized in an essay by Carl McFarland entitled "Administrative Agencies in Government and the Effects Thereon of Constitutional Limitations" (1934), in which he stated at page 15:

> Decisions involving the statutory scope of administrative powers are more numerous than the statutes themselves, and it is not always possible to determine whether the courts are construing statutes involving broadly delegated authority or are examining the sufficiency of the evidence to support an order. The board delegations of authority now permissible make interpretation difficult and often raise a conflict between judiciary and administration in matters of policy. Nevertheless, the basic requirement that administration confine itself to the exercise of only such powers as are delegated to it constitutes a limitation so fundamental as to pass almost without comment in discussions of constitutional and administrative law. [Footnotes omitted.]

It is in the light of this commentary that we will now turn to the first subsidiary issue mentioned above in order to determine whether we possess the statutory power to deal with unlawful discrimination in transportation.

As earlier noted, there is no longer any question of the Commission's jurisdiction to regulate all aspects of services and facilities of carriers (which must be carefully distinguished from the employment practices of these carriers). Existing provisions of the Interstate Commerce Act respecting railroads and express companies, common carriers by motor vehicles, common carriers by water, and freight forwarders under parts I, II, III, and IV, respectively, already cover the subject of discrimination in services and facilities. For example, section 216(d) of the act prohibits undue or unreasonable preference, prejudice, or discrimination by motor common carriers in any respect whatsoever. In addition, section 216(e) of the act provides for the filing of a written complaint to this Commission for any violation of section 216. Comparable provisions exist in every other part of the act with respect to other regulatees subject to the jurisdiction of this Commission. Moreover, because of the unique nature of passenger operations, the Commission pursuant to its rulemaking powers adopted and delineated special rules pertaining to discrimination based upon race, color, creed, or national origin by motor common carrier subject to section 216 of the act[8]. Implementing regulations are codified at 49 CFR 1055. These provisions are guidelines to regulatees in all their activities relating to joint rates, compensation for services, description of traffic, extension of credit, connecting lines, holding of certificates and permits, and acquisition of control, among others.

Each part of the statute contains specific provisions authorizing this Commission *to inquire into the management of* all carriers subject to that part.[9] It is specifically declared to be a goal of the national transportation policy[10] "to encourage fair wages and equitable working conditions" as a means of "developing, coordinating, and preserving a national transportation system ***." The national transportation policy further requires that all provisions of the Interstate Commerce Act be "administered and enforced" with a view to carrying out the above declaration of policy.[11] Neither the declaration of policy nor the substantive provisions of the law, however, contain specific language directly referring to any prohibited discrimination other than respecting "services and facilities." We are unable to find any judicial construction of the language "fair wages and equitable working conditions," and the only decisions of this Commission concerning this requirement merely find that the provision does not empower this Commission to determine questions involving strikes or other labor disputes. See, for example, *Increased Freight Rates, 1948*, 272 I.C.C. 695, 706 (1948); *Local Division 1131, A. F. of L.* v. *A., B. & W. Transit Co.*, 51 M.C.C. 309, 312 (1950). In view of our above conclusions, we do not deem it necessary, here, to reconsider our prior determination in *St. Louis—S. F. Ry. Co. Discontinuance of Trains*, 327 I.C.C. 433 (1965), that the preference and prejudice sections of the act, 3(1), 216(d), 305(c), and 404(b), are limited to the provision of services and facilities. The *Discontinuance* case, *supra*, it may be noted, found essentially that the sections of the act relied upon by the parties did not confer such jurisdiction, not that this

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[8] *Discrimination—Interstate M. Carriers of Passengers*, 86 M.C.C. 743 (1961).

[9] Sections 12(1), 204(a)(7), 304(b), and 403(e) of the act. 49 U.S.C. 12(1), 304(a)(7), 904(b), and 1003(e).

[10] 49 U.S.C. preceding section 1, 54 Stat. 899.

[11] There is little legislative history with regard to this particular provision. The Senate Report (S. Rep. No. 433, 76th Cong., 1st Sess., p. 4) does state that "For the first time, also, the rights of employees are specifically recognized ***," but such recognition related solely to the right of "representatives of employees of a carrier duly designated as such for the purpose of collective bargaining ***," to intervene "in cases of proposed consolidation, mergers, or other forms of unification of properties, as well as in cases where railroads subject to the act are seeking to abandon branch or other lines, and in other proceedings under the bill."

Commission had no jurisdiction in any respect whatsoever to consider employment discrimination.

Neither the Interstate Commerce Act nor any of the acts related to it contains specific language directly referring to employment discrimination, and it appears certain that this issue was not an actual consideration in the drafting of any part of the law specifically directed to this Commission's regulatory activities.[12] Accordingly, it becomes incumbent upon us where possible in the public interest to embrace judicial guidance set forth under interpretations of similar statutes. We shall, therefore, consider the applicability of the recent decision by the Supreme Court in *National AACP* v. *FPC*, 425 U.S. 662 (1976).

In the *FPC* case, *supra*, the Court noted the central issue in question: "to what extent, if any, the Federal Power Commission, in the performance of its functions under the Federal Power Act,16 U.S.C. §791a et seq. (Power Act), and the Natural Gas Act, 15 U.S.C. §717 et seq. (Gas Act), has authority to prohibit discriminatory employment practices on the part of its regulatees." The Court commented that "[t]he question is not whether the elimination of discrimination from our society is an important national goal. It clearly is. The question is not whether Congress could authorize the Federal Power Commission to combat such discrimination. It clearly could. The question is simply whether or to what extent Congress did grant the Commission such authority." The Court then turned its focus to the two specific statutory bases advanced by the petitioners to justify the conclusion that the FPC can or must concern itself with discriminatory employment practices on the part of the companies it regulates.

Respecting the first of these statutory bases ("the legislative command to the [FPC] under the Power and Gas Acts to establish 'just and reasonable' rates for the transmission and sale of electric energy, ***, and for the transportation and sale of natural gas, ***, and, consequently, to allow such rates as will prevent consumers from being charged with any unnecessary or illegal costs,") and the second and broader statutory basis ("[FPC's]asserted duty to advance the public interest") the Court held that the FPC is authorized to consider the consequences of discriminatory employment practices on the part of its regulatees only insofar as such consequences are directly related to the FPC's establishment of just and reasonable rates in the public interest. To the extent that illegal, duplicative, or unnecessary labor costs are demonstrably the product of a regulatee's discriminatory employment practices and can be or have been demonstrably quantified by judicial decree or the final action of an administrative agency the FPC should disallow them.

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[12] Public Law 94-210, Railroad Revitalization and Regulatory Reform Act of 1976, sections 905 and 906, respectively, assign certain additional responsibilities to the Secretary of Transportation concerning regulating nondiscrimination under railroad financial assistance provisions of the act and the establishment of a Minority Resource Center to assist minority business enterprises. The United States Railway Association and the Consolidated Rail Corporation as well as the Secretary of Transportation are directed to support this Minority Resource Center.

The Supreme Court further found that the FPC's asserted duty to advance the public interest does not afford any basis for its prohibiting regulatees from engaging in discriminatory employment practices, as references to the "public interest" in the Federal Power Act and Natural Gas Act require the FPC to promote the orderly production of plentiful supplies of electric energy and natural gas at just and reasonable rates, and do not constitute a directive to the FPC to seek to eradicate discrimination.

We believe that we are bound by the principles set forth in the *FPC*, case, *supra*.

Rate issue.—The Supreme Court made it unmistakably clear in the *FPC* case that regulatory agencies, such as the ICC, have the *duty* to disallow rates which are demonstrably the product of a regulatee's discriminatory employment practice, to the extent that any unnecessary or illegal costs involved in the making of the rate will be passed on to the consuming public. Mentioned as examples of such disallowable costs are backpay awards and attorney's fees to the extent they can or have been "demonstrably quantified by judicial decree or the final action of an administrative agency charged with consideration of such matters * * *." 425 U.S. at 668. The statutory basis for its holding was the legislative command to FPC under its pertinent enabling statutes to establish *just and reasonable* rates.

In view of the similarity between the rate provisions of the Interstate Commerce Act, sections 15, 216, 218, 307, 315, and 406, and the Power and Gas Acts, *supra*, and the clarity with which the Court addressed the rate aspect of the matter, this Commission is convinced that it has the obligation, and will hereby implement the Supreme Court's directive, respecting issues involving rates, as follows:

(1) All carriers and other persons subject to the Commission's jurisdiction are hereby advised that any quantifiable costs demonstrably the product of discriminatory employment practices be, and they are hereby, disallowed as unnecessary costs which may not be included as justification for rate increases; and,

(2) The Bureau of Accounts of this Commission shall, and is hereby directed to, advise all carriers as soon as practicable of the appropriate accounting for such costs.

"*Public interest" theory.*—The argument is raised inferentially by several parties and specifically by the EEOC and the Legal Defense Fund, that the Commission should assume jurisdiction over its regulatees' employment practices pursuant to its congressionally mandated responsibility for protecting the public interest. The Supreme Court unequivocally laid that issue to rest, however, when it affirmed the lower court's rejection of that argument in the *FPC* case. In doing so, it cited an old transportation case[13] for the conclusion that the words "public interest" in a regulatory statute are "not a broad license to promote the general public welfare. Rather, the words take meaning from the purposes of the regulatory legislation." In reiterating the legislative purpose of the Interstate Commerce Act, for example, the Court noted that "in the case of the Interstate Commerce Commission, which is responsible for enforcing an act designed to assure adequacy in transportation service, the term 'public interest' *** is not a concept without ascertainable criteria, but has direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities ***," citing *N.Y. Central Securities Corp.* v. *U.S., supra,* at 24-25. Also *New Haven Inclusion Cases,* 399 U.S. 392, 432 (1970); *National Broadcasting Co.* v. *United States,* 319 U.S. 190, 216 (1943); *Federal Radio Comm'n.* v. *Nelson Bros. Bond & Mortgage Co.,* 289 U.S. 266, 285 (1933). Thus, analogous to the reasoning in the *FPC* case, *supra,* and contrary to the position advanced by certain of the parties herein, we discern nothing in the congressional pronouncement of the national transportation policy, the Interstate Commerce Act, or their legislative histories to indicate that the elimination of employment discrimination per se was one of the purposes intended or envisioned by Congress when it enacted this legislation. In investigating the nature and extent of powers conferred by the Constitution even on Congress, the judiciary has historically stated, "it is indispensable to keep in view the objects for which those powers were granted, and resort may be had to the universal rule of construction which applies alike to statutes ***." *Legal Tender Case,* 12 Wall (U.S) 457 (1870).

This fundamental principle, that specific or implied intent to create the power is essential to Federal jurisdiction, is no less applicable to us, and we must strictly adhere to the standards, policies, and limitations provided in the statutes vesting power in us.

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[13] New York Central Securities Co. v. *U.S.*, 287 U.S. 12, 24-25 (1932).

This legal tenet has consistently been reiterated by the courts. See also *Peter's* v. *Hobby* 349 U.S. 331 (1955); *Morgan* v. *United States,* 298 U.S. 468 (1936); *Texas & P.R. Co.* v. *Interstate Commerce Commission,* 162 U.S. 197 (1896). In view of these precedents, and the plainly manifested purpose of the language used in our statute, we must conclude that the Interstate Commerce Act confers power in this Commission over the employment practices of its regulatees respecting discrimination which extends only to the extent of the mandated purpose enunciated in the *N.Y. Central Securities Co.* case, *supra,* e.g., "adequacy of transportation service, *** and best use of transportation facilities." Our jurisdiction cannot be couched in the asserted statutory basis of "public interest" proposed herein. We, therefore, must reject that premise.

Commission's range of concern in matters other than rates.—At this point in our examination of employment discrimination it is clearly evident that the scope of our authority in this area is fairly limited. The Supreme Court's opinion in the *FPC* case states "that the Federal Power Commission is authorized to consider the consequences of discriminatory employment practices on the part of its regulatees *only insofar as much consequences are directly related to the *** establishment of just and reasonable rates* in the public interest," 425 U.S. at 671 (emphasis added). This statement leaves some uncertainty as to whether the FPC's consideration of the consequences of a regulatee's discriminatory employment practices as a factor in areas other than ratemaking is obligatory, permissible, or beyond its statutory authority. Nevertheless, the Court did not express any disapproval of the court of appeals' broader language, which it quoted, that "the Commission does have power to take into account, in the performance of its regulatory functions, *including licensing and rate review,* evidence that the regulatee is a demonstrated discriminator in its employment relations." (Emphasis added.) 425 U.S. at 664-665. Moreover, the Court made its own broad unequivocal holding that "the Commission has statutory authority to consider the consequences of employment discrimination in performing its mandated regulatory functions." 425 U.S. at 665 (footnote 2). Based on the above, we read the Court's opinion as supporting the broader interpretation that such considerations in areas other than rate review are at least permissible and probably mandatory. On the other hand, while this area of administrative law is not yet fully developed, it is also apparent that our jurisdiction does not extend beyond the scope of the carrier's regulated activity.

In reviewing the evidence of record as a whole we have come to the inescapable conclusion that employment discrimination has existed in the surface transportation industry as it has in other segments of our society. In varying degrees and circumstances the consequences of such discrimination by virtue of its inherent nature have probably had an impact on the regulated activities of those subject to our jurisdiction. We are convinced, therefore, that within the statutory scheme of the Interstate Commerce Act, it is permissible, and we are willing to consider in the future, the consequences of illegal employment discrimination in rates, licensing, and other areas of our administrative authority. The necessary prerequisite to such consideration, however, must be a showing, by substantial evidence, that the discriminating activity impacts on the regulatee's regulated activities. This statutory construction, we believe, defines the limits of our mandated regulatory functions.

In each grant of operating authority, the Commission must make a finding not only that the service is required, but also that applicant is fit, willing, and able to conduct the proposed operation. It is, therefore, conceivable that the issue of employment discrimination could properly be raised in such proceedings, if shown to be materially relevant to the proposed regulated activity. A similar finding of fitness is made with respect to applications for brokers' licenses, freight forwarder permits, and applications for water carrier certificates and permits. Also, in so-called section 5 proceedings (49 U.S.C. 5) the Commission makes a finding that transferee is fit, willing, and able to conduct the service under the authority being purchased and the same is true of transfer proceedings under section 212(b) of the act. As a practical matter however, having a limited investigative staff and with existing budgetary constraints, it is simply impossible for the Commission to investigate, formally, the fitness of each applicant. Consequently, the burden is upon the applicant to present evidence affirmatively establishing its fitness, and unless such evidence is controverted by parties in opposition to the application or by interveners in the proceeding, a negative finding would be unusual. It should be clearly understood, however, that in any event the Commission does not intend, nor do we contemplate it our role, to be the investigator and adjudicator of individual complaints of employment discrimination.

That function is properly vested by Congress in EEOC and others. Further, we do not deem it necessary at this time to delineate all of the possible methods of bringing to the Commission's attention information which could be relevant to our determination of a regulatee's fitness. It should nevertheless be noted, for example, that evidence of a carrier's illegal operation is not a prima facie showing of unfitness under existing rules and regulations. In order to make a finding of unfitness the carrier's illegal activity must be shown to be "flagrant" and "persistent." Compare, *Gibney Distributors, Inc., Ext.—Camp Baggage*, 119 M.C.C. 286, 293, (1973); *Distributors Service Co., Extension—Foods*, 118 M.C.C. 322, 329 (1973); *Johnny Brown's, Inc., Extension—Winchester, Va.*, 111 M.C.C. 905, 908 (1970); and *Eagle Motor Lines, Inc., Ext.—Lincoln, Ala.*, 107 M.C.C. 499, 503 (1968). It must, therefore, be remembered that illegal conduct, i.e., a proven instance of unlawful employment practice which impacts on a carrier's regulated activities, would merely be a factor which bears on that carrier's fitness and would not be determinative of the issue of fitness itself.

Exclusiveness of jurisdiction of other agencies.—In view of our above conclusion that it is within the purview of the Commission's mandated regulatory function to consider the consequences of employment discrimination to the extent that such discriminating activity impacts on the regulated activities of those subject to our jurisdiction, we do not believe a recapitulation and detailed discussion of the arguments for and against the subsidiary issue of exclusiveness of jurisdiction of other agencies is necessary. We believe it suffices to indicate that Title VII of the Civil Rights Act of 1964[14] clearly and unmistakably forbids employment discrimination on the basis of race, color, sex, religion, or national origin. Section 703(a) provides:

> (a) It shall be an unlawful employment practice for an employer—(1) to fail to refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
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> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Section 706 of that act establishes the machinery for individuals to bring their complaints of employment discrimination to the Equal

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[14] Sections 701-16, 42 U.S.C. 2000e to 2000e-15 (1964).

Employment Opportunity Commission, an agency established by section 705 of the Civil Rights Act of 1964, and thereafter to the Federal district courts. The question here is whether the provisions of Title VII have deprived other agencies such as this Commission of jurisdiction to consider discrimination in employment. That they did not is evident, we believe, from the Civil Rights Act itself, its legislative history, contemporaneous executive and administrative interpretations, and judicial decisions construing the terms of that statute.

The legislative history of the Civil Rights Act of 1964 discloses that Senator John Tower at the time of its consideration introduced an amendment which dealt squarely with the question of concurrent jurisdiction. The proposed amendment read:

> Section 711. Beginning on the effective date of sections 703, 704, 706, and 707 of this title, as provided in section 716, the provisions of this title shall constitute the exclusive means whereby any department, agency, or instrumentality in the executive branch of the Government, or any independent agency of the United States, may grant or seek relief from, or pursue any remedy with respect to any employment practice of any employee, employment agency, labor organization, or joint labor-management committee covered on this title, if such employment practice may be the subject of a charge or complaint filed under this title.

In explaining the amendment Senator Tower stated that it dealt with the problem of "unnecessary harassment and expense" resulting from "overlapping investigations by Federal agencies or commissions."[15] Later, he added that:

> All that would be precluded by my amendment would be simultaneous, concurrent requirements placed upon an employer or union by more than one Federal agency.

The amendment was defeated 59 to 29, with 12 Senators not voting.[16]

Section 705(g)(1) of the 1964 Civil Rights Act empowers the EEOC "to cooperate with *** other agencies, both public and private *** to achieve the ends of nondiscriminatory employment." This provision would, in our judgment, be all but useless were the jurisdiction of the EEOC held to be exclusive.

Affirmative Commission duty.—The major proponents of regulation assert that the fifth amendment to the Constitution imposes an affirmative obligation on this Commission to enforce the equal employment requirements of Title VII. They aver that our licensing and other general regulatory powers are the type of "state action" so closely related to the operations of the carriers that the Commission is constitutionally obligated to act, citing *Burton* v. *Wilmington Pkg. Auth.*, 365 U.S. 715 (1961); *Simkins* v. *Moses H. Cone Memorial Hospital*, 323 F. 2d 959 (4th Cir. 1963), cert. denied, 376 U.S. 938 (1964); *Citta* v. *Delaware Valley Hospital*, 313 F. Supp. 301 (E.D.Pa. 1970); *Irvis* v. *Scott*, 318 F. Supp. 1246 (M.D.Pa. 1970), *rev'd* 407 U.S. 163 (1972), and other cases. We are unable, however, fully to adopt the position advanced by these parties. None of the Court decisions cited by them stands for the principle that regulation of the type performed by this agency vests the operations of its licensees with such "state" action as to *require* us to prohibit discriminatory employment practices *per se*. In all of the cases to which reference has been made in this context, where the discrimination was found to exist in employment practices, there appears to have been some form of privity of contract between the discriminating employer and the governmental agency. In *Seidenberg* v. *McSorley's Old Ale House*, 308 F. Supp. 1253 (S.D. N.Y. 1969), the prohibited activity involved discrimination in *service*, long recognized to be prohibited by sections 3(1), 216(d), 305(c), and 404(b) of the Interstate Commerce Act; *Mitchell* v. *United States*, 313 U.S. 80 (1941); *Henderson* v. *United States*, 339 U.S. 816 (1950); and discussion and cases, *supra*, in the Historical Background section of this report. The *FPC*, *Burton*, and *Simkins* case, *supra*, plainly indicate that no specific definition of "state" action can be given. The facts of each case shall be determinative. No court has yet found that regulation of the type performed by this Commission constitutes state involvement in the discrimination, and, in view of our other findings in this report, we see no need for deciding this issue here.

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[15] 110 Cong. Rec. 13650 (1964).

[16] 110 Cong. Rec. 13652 (1964).

The exercise of jurisdiction.—It is argued that even if the Commission is found to have some degree of jurisdiction over the regulation of employment practices, it should not be exercised. Opponents of regulation point to voluntary industry improvements, to the fact that other agencies, both Federal and State, have the necessary authority and are doing a good job, and to the already available remedy of using the courts which have been generally receptive to complaints of employment discrimination. They note that there are already conflicting rulings and practices in the policies of the EEOC and the Contract Compliance Division of the Postal Service. Additionally, the Commission's own workload is exceedingly heavy, and to accept responsibility for a whole new area of regulation would heighten the existing burden and increase the present backlog.

As seen from our earlier discussion of the *FPC* case, the scope of the ICC's authority to act is limited when it comes to matters of employment discrimination by regulated companies. However, once found to be within our jurisdiction, we can hardly overlook an activity that impacts on a carrier's rate filings or its fitness to operate. To do so would be an abdication of our statutory responsibility. We do not perceive this limited role as being an inordinate burden upon us, since it is merely an extension of our present role in performing our statutory responsibilities. We envision that the more difficult task we face relates to the evaluation and weighing of relevant evidence respecting employment discrimination because of our unfamiliarity with such problems and our lack of expertise in this area. Nevertheless, we will endeavor in those proceedings where employment discrimination is an issue, as it is our primary objective in all other proceedings, to consider fairly the evidence presented by all parties and arrive at a just and equitable conclusion consistent with our regulatory purpose.

Issuance of regulations.—Having considered the comments presented herein, in light of the Court's decision in the *FPC* case, *supra,* this Commission has concluded that no new regulations should be adopted in this proceeding. Procedures already exist that in the future will allow a party to place in issue a carrier's allegedly unlawful employment practices.

We see no reason why the ends sought to be achieved by the proposed rules relating to employment discrimination, respecting participation in our proceedings by interested parties, admission of pertinent evidence, and appropriate consideration of such evidence, may not be handled in the same manner that other relevant matters are brought to this Commission's attention. For example, we have considered in the past, where relevant to our decision, evidence relating to an applicant's noncompliance with other pertinent Federal and State laws which involved matters obviously beyond the scope of our primary jurisdiction, particularly respecting Federal tax laws[17] and various State laws and regulations.[18] Specific rules under the Commission's General Rules of Practice delineate clearly the requirements for participation in our proceedings by interested parties.[19] Thus, within the range of concern of this Commission's functions in the area of employment discrimination, as now seen, we are reasonably certain that our existing rules and regulations are sufficiently broad and adequate to insure appropriate consideration of all matters relevant to the carrying out of our statutory responsibilities. We, therefore, do not deem it necessary at this time to adopt any further rules and regulations to accomplish the aim of those rules proposed by the parties.

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[17] *Axtell Extension—California And Nevada,* 83 M.C.C. 571 (1960); and *Crawford Common Carrier Application,* 81 M.C.C. 793, 796 (1959).

[18] *Love Contract Carrier Application,* 2 M.C.C. 467, 470 (1937); *Tocco Common Carrier Application,* 24 M.C.C. 41, 42 (1940); *Rubin and Greenfield Common Carrier Application,* 33 M.C.C. 383, 389 (1942); *Southwest Frt. Lines, Inc., Extension—Glass Products,* 54 M.C.C. 205, 219 (1952); and *Riss & Co., Inc., Extension—Explosives,* 64 M.C.C. 299, 350 (1955).

In coming to a final conclusion on the question of what we ought to do, and weighing the effectiveness of any action which we may statutorily have the prerogative to take, we are convinced that the most appropriate method of handling issues involving employment discrimination relevant to our proceedings is on a case-by-case basis, and then only when they have come to our attention in the ordinary course of exercising our responsibilities, or have been presented to us by interested parties as a relevant factor in our ultimate determination of the matter in question. We believe that this approach lends itself to the development of a complete record regarding material issues, allows us time to gain the experience to determine whether additional or more specific regulations are required or will become necessary, is more economically suited to all parties concerned, preserves the substantial rights of the parties to offer and rebut evidence in an open forum, and consequently enhances the proclivity of members of the public to participate in our proceedings and be heard when they feel such participation would be beneficial. In the future, therefore, we will proceed in the manner described above and will not promulgate new regulations at this time.

Minority participation.—The U.S. Commission on Civil Rights and others note that entry into the business of motor transportation requires only a small investment and should be a fertile field for minority entrepreneurs. They charge that we have failed to change our procedures to enable minority groups to compete on an equal basis; that the principal issue in application cases centers upon the need to maintain the solvency and competitive position of existing carriers; and that our policy of preventing unreasonable and unwarranted competition makes it unlikely that a program of minority business ownership in transportation can be successfully implemented.

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[19] 49 CFR 1100.1 *et seq.*

This Commission, however, is mandated by the Congress, in the Interstate Commerce Act which we administer, to judge all applicants for operating authority by the same objective standards. That statute, as well as Title VII of the Civil Rights Act of 1964 and, we believe, the Constitution itself, are essentially colorblind and do not permit the modification of entry requirements on the grounds that an applicant is black, small, or poor. As similarly stated by Justice Douglas in *DeFunis* v. *Odegaard*, 416 U.S. 312, 333 (1974) (dissenting opinion), "the consideration of race as a measure of an applicant's qualification normally introduces a capricious and irrelevant factor working an invidious discrimination," citing *Loving* v. *Virginia*, 388 U.S. 1 (1967); *Harper* v. *Virginia Board of Elections*, 383 U.S. 663 (1966); and *Anderson* v. *Martin*, 375 U.S. 399 (1964). We have consistently maintained that the minority status of an applicant cannot be a determinative factor in our proceedings. See *Elegante Tours, Inc.—Broker Application*, 113 M.C.C. 156, 160 (1971); *James Common Carrier Application*, 124 M.C.C. 225, 230 (1975); *O-J Transport Company Com. Car. Applic.*, 120 M.C.C. 699, 703 (1974), affirmed *O-J Transport Company* v. *United States et al.*, 536 F. 2d 126 (6th Cir. 1976); and *Shippers Truck Service, Inc.—19 States*, 125 M.C.C. 323, 329-331 (1976). In the *O-J Transport* case, *supra*, the United States Court of Appeals for the Sixth Circuit stated, "[t]he task of enforcing the transportation policies of the nation is an enormous one. The skills of the Commission's staff are not those required to implement an affirmative action program designed to enlarge the opportunities of minority-owned and operated businesses *** Congress has not chosen to require the Commission to consider minority ownership as a factor in determining public convenience and necessity and it is beyond our authority to impose such requirement" (536 F. 2d at 132-133). This judicial opinion clearly puts the Commission's role in this area into proper perspective.[20] Other judicial opinions imply that since there is no superior person by constitutional standards, an applicant who is a minority group member is entitled to no advantage by reason of that fact; nor is he subject to any disability. As more succinctly put by Justice Douglas respecting the broader question, "[t]he Equal Protection Clause commands the elimination of racial barriers, not their creation in order to satisfy our theory as to how society ought to be organized." *DeFunis* v. *Odegaard, supra,* at 337. The Supreme Court has also rejected the collateral contention that the Constitution is violated because the objective standards employed by the Commission in application proceedings have had a disproportionate impact on minority applicants, in terms of their ability to enter the transportation fields. See *Walter E. Washington, et al.* v. *Alfred E. Davis, et al.*, 426 U.S. 229 (1976), where the Court, in analogous circumstances, enumerated two prerequisites to the constitutional invalidity of such standards. It stated that "a purpose to discriminate must be present which may be proven by systematic exclusion of [eligible minority applicants] * * *, or by an unequal application of the law to such an extent as to show intentional discrimination." Citing *Akins* v. *Texas*, 325 U.S. 398, 403-404 (1945). We believe that the same reasoning is equally applicable in the context here being considered. As the Court at 426 U.S. at 248 stated:

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[20] Following the *O-J Transport* case, *supra*, in the *Shippers Truck Service* case, *supra*, we found that, although the situation was not there presented, racial and ethnic factors can be considered when they relate to the nature of the transportation service proposed by an applicant and the public's need for that service.

> A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white.
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> Given that rule, such consequences would perhaps be likely to follow. However, in our view, extension of the rule beyond those areas where it is already applicable by reason of statute, such as in the field of public employment, should await legislative prescription.

In addition, to utilize variable, nonobjective standards would be to foment a well-founded public distrust of the administrative decisionmaking process, a distrust that would surely mark the end of transportation regulation as we know it today.

Motor carrier regulation.—Several parties in this proceeding, and others, argue assiduously that regulation per se has impeded greater participation by minority entrepreneurs in surface transportation and urge us to abandon entry standards.

Commission decisions regarding the issuance of operating rights to motor common carriers are based on the following considerations: (1) whether the new operation or service wil serve a useful purpose, responsive to a public demand or need; (2) whether this purpose can or will be served as well by existing lines or carriers; and (3) whether this purpose can be served by applicant with the new operation or service proposed without endangering or impairing the operations of existing carriers contrary to the public interest. *Pan-American Bus Lines Operation,* 1 M.C.C. 190, 203 (1936). Based on this tripartite test, the operations and services of existing carriers must not be ignored and the effect of a grant of authority upon the total quantity and quality of service available to the public must be weighed to determine where, on balance, the public interest may lie. Thus, neither the solvency of, nor the competitive effect upon, existing carriers takes precedence over the need of the public for adequate, even competitive, new services.

While substantial numbers of minority truckers for one reason or another do not hold extensive interstate authority, there is no present statutory basis on which this fact alone can become a decisional factor in any particular proceeding under existing law.[21] We must, however, reject the allegation that our present practices serve only to maintain the *status quo*, either in fact by virtue of the number of new entrants, or by application of the law in view of unequivocal judicial interpretation and the existence of other lawful approaches to eliminating or at least reducing those inequities which exist.

Commission initiatives.—The Commission supports any effort to foster the development of minority entrepreneurs and other small business concerns, and to facilitate their movement into the mainstream of the American economy. Within administrative discretion and budgetary constraints, the Commission can and does provide basic information and assistance to members of the public, individually upon request and collectively, as a matter of standard policy. This information and assistance are particularly helpful to those less familiar with what this agency is all about. An example of such available assistance is the so-called ombudsman position, recently created by the Commission to respond to inquiries and to provide assistance relating to all matters handled by the Motor Carrier Board. Additional assistance on other matters is available at our headquarters in Washington, D.C., and at 79 field offices located throughout the country. Furthermore, the Commission now has a toll-free hotline service, open during business hours, whereby highly trained staff specialists will answer questions from shippers, truck drivers, and carriers. We have found it to be highly responsive to public needs for immediate information or assistance.

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[21] A more complete statement of Commission policy in this area was made on December 4, 1975, by the Commission's (then serving) Vice Chairman. Excerpts from his statement are set forth in appendix III to this report.

In the area of interagency programs, the Commission is an active member of the Interagency Council for Minority Business Enterprise, to which our Vice-Chairman is the designated representative. Since this past February, the Commission has participated on an Ad Hoc Interagency Task Force for the planning and developing of a national minority trucking initiative, in conjunction with representatives from the Office of Minority Business Enterprise, the Department of Transportation, and the Department of Labor. This task force has been working to develop means of providing greater technical assistance to minority trucking firms. Their joint efforts have already resulted in the issuance, on May 3, 1976, of a solicitation for a minority trucking assistance contract (designated Department of Commerce solicitation 6-36481) to be funded by the Office of Minority Business Enterprise in the Department of Commerce (OMBE). The work of this task force is representative of the type of positive action which should tend to resolve the specific problems facing minority carriers today (i.e., acquiring adequate capitalization, managerial expertise, and legal assistance, to name a few of those problems). We believe that this Commission can perform an important and useful public service by bringing together those who need a particular motor carrier service, and those females, minority group members, and small truckers generally who are willing to provide it. Toward this end, we believe that the above initiatives designed to apprise interested persons of the opportunities and benefits to be found in the trucking industry and to assist in any way possible are important initial steps. Although we have no power to abandon or relax statutory entry standards, we will continue to make every effort, in the manner described above, to increase minority and female participation and enhance their chances of success in the surface transportation industry.

Finally, several parties urge that the Commission provide legal service to minority applicants. Section 16(11) of the act, 49 U.S.C. 16(11), authorizes this Commission to "employ such attorneys as it finds necessary *** for proper representation of the public interests in investigations made by it on cases or proceedings pending before it ***; and the expenses of such employment shall be paid out of the appropriation for the Commission." One basic reason why it has been and would be impossible for this Commission to provide substantial funding for private public interest groups is the expense that would be involved. Even today we are not current in handling our caseload and do not have adequate funding to meet some of our basic staffing and other regulatory needs. Moreover we believe that essential informational material is available from the several Commission offices mentioned in the preceding pages. Therefore, the proposed rule that we provide "sufficient funds to responsible private representatives of the public interest to enable them to present the independent views of the public" will not be adopted. In this regard, it may also be noted that administrative proceedings should be structured to be essentially inexpensive means for the public to express its views, and that because the interest of the public is ultimately the prime concern of this Commission in *every* proceeding which we are called upon to determine, we will continue to review our procedures to make them as inexpensive and responsive to the needs of all segments of the public as is consistent with the requirements of the law.

FINDINGS

Upon consideration of the entire record herein, we conclude and find:

(1) That discriminatory employment practices do exist in the surface transportation industry subject to our jurisdiction as in other industries not within the purview of our regulatory authority, but visible efforts are being made by the industry itself to correct these problems.

(2) That the Interstate Commerce Commission, pursuant to the principles set forth in *NAACP* v. *FPC*, 425 U.S. 662 (1976), has jurisdiction (a) to disallow any quantifiable costs demonstrably the product of discriminatory employment practices as unnecessary costs which may not be included as justification for rate increases; and (b) to consider the consequences of employment discrimination, as a factor, in licensing fitness, and other areas, but only if the discriminating activity impacts on the regulatee's regulated activities.

(3) That this Commission's Bureau of Accounts shall, and hereby is directed to, notify all carriers, as soon as practicable, of the appropriate accounting for such costs.

(4) That this Commission's range of authority in the area of employment discrimination does not extend beyond the scope of the regulatee's regulated activity.

(5) That the Commission's existing rules and regulations appear adequate, at this time, for the bringing of matters involving employment discrimination revelant to our proceedings to the Commission's attention for appropriate consideration and, therefore, neither the adoption of those proposed rules which are within our power to adopt, nor the promulgation of any new rules is necessary.

(6) That the Commission will handle issues involving employment discrimination on a case-by-case basis until we gain the experience and a need for additional rules presents itself.

(7) That the Commission will continue to assist and support programs designed to enhance and encourage greater female, minority, and small business concerns participating in surface transportation subject to our jurisdiction.

(8) That the proceeding in No. MC-C-7255 should be dismissed.

(9) That the proceeding in Ex Parte No. 278 should be discontinued.

(10) That this decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

An appropriate order will be entered.

COMMISSIONER MURPHY, concurring:

I believe that the majority in its interpretation of *NAACP* v. *FPC*, 425 U.S. 662 (1976), has failed to correctly assess that decision.

APPENDIX I

Initial Statements[1]

A. FEDERAL AGENCIES

1. *Department of Transportation.*—DOT, as self-styled coordinator of the national transportation policy, has invited governmental agencies to meet with it and to discuss the subject matter of this proceeding. During these conferences, the interests of the various agencies have assertedly emerged, and the Department believes that by providing a forum for such discussion, it has advanced the process of response to this Commission. DOT maintains that there exist in surface transportation discrimination which is at least prima facie unlawful; that the national transportation policy requires this Commission to encourage equitable working conditions; that elimination of unlawful discrimination practices by regulatees is mandated by the Supreme Court decisions in *Bolling* v. *Sharpe*, 347 U.S. 497 (1954); and *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961); and that the act itself provides this Commission with the necessary authority to deal with unlawful discrimination. *Mitchell* v. *United States*, 313 U.S. 80 (1941); and *I.C.C.* v. *Railway Labor Executives Assn.*, 315 U.S. 373 (1942). The Department urges us to proceed expeditiously in this matter and to fashion appropriate rules and regulations to eliminate discrimination in surface transportation.

2. *Office of Minority Business Enterprise (OMBE) of the United States Department of Commerce.*—This office is charged under Executive Order No. 11625 with the responsibility to promote and coordinate both public and private efforts to establish, preserve, and strengthen minority business. OMBE notes that although one-sixth of our total population is comprised of minority group members, minority Americans own less than 4 percent of the businesses, which, in turn account for less than 1 percent of our Nation's gross business receipts. This problem exists, it is asserted, because the historical denial of access to business has resulted in a lack of business heritage, and there is no reason to believe that the trucking industry is any less discriminatory than other businesses.

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[1] It should be noted at this juncture that initial and reply representations were submitted well before final preparation of this report. Thus, some of the cases cited by the parties as pending have since been resolved, and some of those previously resolved have been reversed. We recognize that in almost all instances, the citations regarding status were accurate at the time the representation was submitted.

OMBE refers to certain statistical evidence which it believes indicates that employment practices in the trucking industry significantly hampered minority-group members in obtaining management positions and access to entrepreneurial experience and opportunity. OMBE's statement includes a lengthy report prepared by the Independent Truckers League (ITL) which is a trade association of independent minority owner-operators funded by several governmental agencies. The ITL report alleges that the industry has consistently denied blacks entry into more skilled, professional, and better paying jobs; that, despite the existence of more than 30,000 black owner-operators, who have made substantial investment and have acquired experience in the area, only one black trucker has been awarded interstate operating authority to operate across the country as a common carrier (compared to over 14,000 white-owned firms); and that this Commission has participated in this exclusion by narrowly construing "public convenience and necessity" when considering minority applications.

OMBE's interests are twofold: first, to assure equal opportunity to minorities in attaining management and responsible positions; and second, to facilitate the expansion of legitimate trucking operations for minority owner-operators. While OMBE does not endorse the views or conclusions in the ITL report, it urges this Commission to hear and test the validity of the ITL's allegations, and, if substantiated, to consider and implement effective remedial action. It believes that licensees should be required by appropriate action to demonstrate positive and sufficient efforts to move qualified minorities into management and higher skilled positions and that effective means must be found to prevent and eliminate illegal discrimination and to implement affirmative action programs to rectify past exclusion of minority employees and applicants from management positions.

3. *Office of Equal Employment Compliance of the U.S. Postal Service.*—This office is assigned the responsibility under Executive Order No. 11246 of monitoring the surface transportation industry so as to assure equal employment opportunity to all persons, regardless of race, creed, color, sex, or national origin. The Office submits that the hiring practices of the surface transportation industry as a whole have been the main weapons for denying equal opportunity in employment to minorities. It represents that unfairly administered tests have been the principal instruments used either to keep minorities out of the industry altogether or to hold their utilization to the bare minimum. Some methods assertedly include: employment tests with double-standard cut-off scores, double-standard qualifications, experience, level of education, and seniority. The Office determined that five trucking companies with Government contracts which had no intention of increasing their minority employment, was referred to the Justice Department for legal action. It reports that in less than 6 months, four of the five companies indicated their willingness to enter into affirmative action programs, rather than go through the expense of costly litigation. Statistics for 1969, 1970, and the first half of 1971, show that minority group members (both male and female) represented 15 percent, 13 percent, and 13 percent, respectively, of the total personnel hired in the trucking industry during those periods. Thus, the Office avers that the industry continues to be lax in its application of any affirmative action program, and no real effort is being made toward increasing minority employment. The Office states that industry claims it does not have time to write letters to minority referral sources, yet it does have time to call employment agencies and other sources to furnish primarily white applicants for all job categories; and that when industry does notify minority sources, it is generally in a lackadaisical manner. As it believes that very few companies will voluntarily develop broad affirmative action programs, it

asks this Commission to use its regulatory power to help regulate affirmative actions, or equal employment opportunity, in the surface transportation industry.

4. *Office of Federal Contract Compliance of the United States Department of Labor (OFCC).*—This office is vested with ultimate responsibility for the administration and enforcement of Executive Order No. 11246, as amended by Executive Order No. 11375, which promotes and insures equal employment opportunity for all persons seeking employment with Government contractors and subcontractors or with contractors and subcontractors performing under federally assisted construction contracts. It points out that nondiscrimination in employment is a national policy of highest priority dating back to Executive Order No. 8802, issued in 1941; that Federal concern in this area extends to every aspect of employment in every industry and is an indivisible part of the Government's policy on each of the matters regulated by the Federal agencies (including the FCC, the Civil Aeronautics Board, the Federal Highway Administration, the NRLB, and the ICC); and that elimination of discrimination is a major undertaking requiring the efforts of more than a single governmental agency. Presently, four Federal agencies have a special antidiscrimination function—the OFCC, the EEOC, the Justice Department, and the U.S. Commission on Civil Rights. OFCC represents, however, that the various regulatory agencies may attack the problem of equal employment opportunity from an entirely different prospective; that because of their special knowledge of the industries they regulate and their continuing supervision over these industries, these agencies can bring substantial effectiveness to this policy; and that enforcement by the regulatory agencies will not interfere with the operations of the so-called civil rights agencies, citing *Colorado Anti-Discrimination Commission* v. *Continental Airlines*, 372 U.S. 714 (1963); *Norman* v. *Missouri Pacific Railroad*, 414 F. 2d 73 (8th Cir. 1969); and *Tipler* v. *E. I. duPont de Nemours and Co.*, 443 F. 2d 125 (6th Cir. 1971).

The experience of the OFCC has lead it to believe that specific rules governing industry employment practices must be adopted by the enforcing agency before any meaningful enforcement can occur. While the OFCC does not offer any specific proposed rules, it does set forth a number of basic points which it views as necessary to any regulations regarding equal employment opportunity. These suggestions are set forth in detail in appendix II to this report.

5. *The United States Commission on Civil Rights.*—The Civil Rights Commission is an independent, bipartisan, fact-finding agency, whose duties are to submit reports of its activities, findings, and recommendations to the President and the Congress, to appraise the laws and policies of the Federal Government with respect to denials of equal protection of the laws, and to serve as a national clearinghouse for civil rights information. Its comments herein pertain solely to the content of the regulations which it contends this Commission should issue regarding equal employment opportunity.

The Civil Rights Commission believes that such rules should provide that all businesses subject to regulation by this Commission have clearly defined duties, including the obligation to take affirmative action to assure equal employment opportunity; that carriers should have written affirmative action plans, including the assessment by the employer of any present deficiencies and the formulation of a plan, including goals and timetables, for correction of such deficiencies; that the rules should provide procedures for close coordination with other agencies of government; that the statutory and constitutional obligation of this Commission to assure effective enforcement should be clearly reflected; and, finally, that the rules should provide a range of appropriate sanctions for noncompliance.

The Civil Rights Commission also suggests certain substantive and procedural arrangements which would implement the foregoing general specifications. These are set forth in Appendix II to this report. It further indicates that additional advice on issues pertaining to the content of rules and regulations might be desirable.

6. *Civil Rights Division of the Department of Justice.*—The Division believes that discriminatory employment practices do exist among at least two classes of carriers subject to Commission jurisdiction: the railroads and the motor carriers. *Jones* v. *Lee Way Motor Freight, Inc.*, 431 F. 2d 245 (10th Cir. 1970), *cert. denied* 401 U.S. 954 (1971); and *Bing* v. *Roadway Express, Inc.*, 444 F. 2d 687 (5th Cir. 1971).[2] The Division's pleading herein is concerned primarily with whether the Interstate Commerce Act prohibits discrimination in employment and whether this Commission has authority to promulgate rules and regulations forbidding such discrimination. It argues that in administering the act, this Commission's responsibility is to achieve the goals of the Congress set forth in the national transportation policy, *American Trucking Associations, Inc.* v. *Atchison, Topeka & Santa Fe Railway Co.*, 387 U.S. 397 (1967); that one of these goals is to encourage fair wages and equitable working conditions, and that a carrier engaging in discriminatory employment practices is not providing equitable working conditions.

In addition, the Division contends that each part of the act contains similar statutory prohibitions against discrimination which are believed to extend to employment, citing the *Mitchell* case, supra; *Boynton* v. *Virginia*, 364 U.S. 454 (1960); and *Henderson* v. *United States*, 339 U.S. 816 (1950). It points out that the Supreme Court in the *Boynton* case, in referring to section 216(d) of the act, stated that the act "uses language of the broadest type to bar discrimination of all kinds." 364 U.S. at p. 457. Thus, it avers that it may be inferred that this and other similar sections of the statute prohibit discrimination in employment as well as in the services of the common carriers, or at least that they authorize this Commission to adopt regulations which prohibit such discrimination and which aid in effectuating the act's statutory ban on discrimination in employment. The rulemaking authority of this Commission is deemed to be "coterminous with the scope of agency regulation itself" and is not limited to the promulgation of procedural rules. *American Trucking Associations, Inc.* v. *United States*, 344 U.S. 298, 311 (1953). While part I of the act contains no specific rulemaking provisions, the Division represents that this Commission nevertheless has the power to act to carry out the statutory ban on discrimination.

The Civil Rights Division asserts that any rules and regulations should (1) make clear that the carriers' burden under other statutes and Executive orders is in no way lessened, (2) provide a procedure making it possible for private persons or groups to bring matters of alleged discrimination before this Commission, and (3) provide a procedure permitting private persons or groups and other governmental agencies to participate and express their views in any proceeding alleging employment discrimination in violation of the act and the rules and regulations, as well as a procedure which would provide this Commission with information and advice of appropriate agencies whenever the lawfulness of a particular employment practice is brought into question.

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[2] We also take official notice of the decision in *U.S.* v. *Trucking Employers, Inc., et al.*, Civil No. 74-453 (D.C. Cir. filed Mar. 20, 1974), involving a class action, instituted by the Division against 7 motor carriers as principal defendants, approximately 342 other motor carriers as members of the defendant class as well as 2 unions and Truckers Employers, Inc., bargaining arm for many major truckers, alleging discrimination against blacks and Spanish-surnamed Americans in hiring, assignment, transfer, and seniority practices. Contemporaneous with the filing of the above suit, the court accepted a partial consent decree with respect to the trucking firms constituting an agreement to try to meet hiring goals set by the decree for getting more minority workers into road and city driver and shop jobs.

7. *Equal Employment Opportunity Commission.*—This is an independent agency of the U.S. Government whose duties are to administer the provisions of Title VII of the Civil Rights Act of 1964, which prohibits discrimination in employment on the basis of race, religion, color, sex, or national origin. As the Government agency most directly involved, it has developed an extensive background and expertise in the employment practices of the trucking industry. EEOC believes that promulgation of rules by this Commission would add another important weapon to the arsenal of regulations available to achieve the national goal of equal employment opportunity. EEOC's presentation is directed only at the trucking industry, which it believes is most in need of immediate action with respect to employment practices. The EEOC has jurisdiction over all companies operating in interstate commerce which have 25 or more employees. (Legislation passed after the filing of this statement has lowered that number to 15.) The EEOC requires those employers with 100 or more full-time employees to file with it an annual report accounting for all employees by race, sex, and national origin for each of nine broad occupational categories. Employment statistics, broken down by standard industrial classification and territorial location, are noted for the year 1970.

In the trucking industry, based upon EEOC's records at the time of filing of this statement, operatives (which include local and long-distance drivers) accounted for nearly one-half of all jobs. Only one job in four was white collar; and of those, more than 40 percent involved office and clerical duties. Blacks constituted 7.3 percent of total employment in industry, with a disproportionately large number to be found in the laborer (17.3 percent) and service worker (23.8 percent) categories, which include dockmen, greasers, washers, night watchmen, yard workers, and janitors. The representation of blacks decreased steadily as status and pay increased. Operatives were 6.9 percent black. Blacks made up only 2.4 percent of the white-collar workers, and were found almost entirely in clerical positions. The above statistics applied in generally similar proportions to Spanish-surnamed Americans. Women held about one-third of the white-collar jobs in the industry, but were consistently excluded from all positions other than clerical. Only 3.3 percent of the women in the industry were employed in other than white-collar work.

EEOC argues that these figures show that there are clear occupational patterns where blacks and other minority group members have not been able to penetrate; that educational achievement is not the cause; that in the trucking industry, blacks have attained 85 percent of the white educational level, but have achieve only 56 percent of white wages; that blacks account for substantially fewer managerial positions and substantially more service worker positions and that blacks are pocketed in jobs with the lowest wages and status and are underrepresented in all other job categories. The greatest underrepresentation occurs in the sales, professional, and managerial categories, but also appears in the clerical and operative categories. It asserts that Spanish-surnamed Americans experience less pocketing than blacks, but are generally underrepresented throughout the industry. Women have far higher representation in the clerical jobs than in the work force as a whole; their representation reaches parity in the technical categories; and they are heavily underrepresented in all other levels. While these patterns are not unusual, their magnitude is assertedly greater in the trucking industry than in industry generally. Spanish-surnamed Americans have greater representation in the managerial, professional, and technical white-collar jobs, but are poorly represented in the sales and clerical jobs.

Records as then made showed that 62 percent of all trucking employees were to be found in 10 States; and that, except for New York, the utilization of blacks in these States were below the statewide, interindustry participation rate for black workers. It is felt that the differing levels are probably due to the varying acceptance of black workers' experience in the various States: Southern States had a greater percentage of blacks in the industry than other regions of the country; black participation rates were higher in 11 Southern States than anywhere in the country except New York.

Of 3,671 trucking establishments reporting on Form EEOC-1, for 1970, 68 percent hired less than 1 percent black white-collar workers. EEOC states that the larger trucking companies appear to be the greatest abusers. Of 20 large trucking firms which account for about 20 percent of all workers in the industry, the average participation for blacks was 5.2 percent, which was lower than the overall industry average. And even that figure was somewhat distorted because one large carrier had an unusually high percentage of blacks, thus inflating the average. These 20 large carriers showed a better record than the trucking industry generally in the hiring of black craftsmen, but a consistently lower utilization of blacks in all except the most menial jobs.

Driving jobs in the industry present a special picture. The jobs do not require a college education, or any special interest in or aptitude for crafts or technical occupations. There is contact with people, but little close supervision. Over-the-road drivers are the highest paid wage earners in the industry, averaging about $11,000 a year, based on 1970 figures. City drivers earned about $8,000 a year. Little training is required. It would appear, therefore, that driving positions, especially over-the-road positions, would be particularly attractive to many minority group members who do not have the educational or technical training required of other jobs. But figures show a very limited number of black drivers, and estimates (no specific figures are available) indicate that extremely few are over-the-road drivers. In one sampling submitted by EEOC, of about 21,000 over-the-road drivers employed by class I carriers, only about 1.1 percent were minority workers. Another sample of 100 randomly selected companies, both large and small, showed a black participation rate of 1.3 percent in road driver positions. The EEOC reports do not break down figures for city and road driver categories. A 1970 study by the Postal Service showed that of 329 trucking companies employing 131,359 persons, the black participation rate in road driver positions was 2.7 percent and city driver positions 6.9 percent. This is substantially similar to the figures cited by Richard D. Leone in "The Negro in the Trucking Industry" (University of Pennsylvania Press 1970). Absent significant sampling errors, this is said to show very little change over a 2-year period despite concerted efforts by the Federal Government to increase black participation. Considering the relatively modest qualifications required for this occupation, the participation rate of 2.7 is particularly low.

As most trucking jobs do not require a high level of education, EEOC asserts that differences in employment statistics cannot be explained on that account. It also points out that corporate headquarters for many of the large companies are located in urban areas, where most blacks are concentrated. It therefore believes that with just a modicum of good faith effort, truckers would experience no difficulty in finding black applicants. This is evidenced by the large number of minority drivers employed by the Postal Service, whose drivers perform the same tasks as do those in private industry. A comparison of 10 States which employ the largest number of trucking workers showed that, except for New York, the participation rate of blacks in trucking is signficantly below that for blacks in industry generally. Similar comparisons assertedly may be made with regard to Spanish-surnamed Americans. The equal employment records of the larger carriers are said to be worse than those of the smaller carriers. In addition to excluding minorities from the industry generally, those blacks that are hired are allegedly placed in segregated job classifications, as witnessed by the separation between over-the-road and city drivers. EEOC's own statistics are cited for this proposition, as are figures from several large motor carriers whose employment policies were at the time the subject of court suits.

EEOC believes that the statistical evidence described above constitutes a prima facie showing of the existence of the unlawful discrimination in the trucking industry, citing the *Jones* and *Bing* cases, *supra*, and *Parham* v. *Southwestern Bell Telephone Co.*, 433 F. 2d 421 (10th Cir. 1970); and that the use of statistics is a proper means of establishing unlawful discrimination, *State of Alabama* v. *United States*, 304 F. 2d 583 (5th Cir. 1962), affirmed *per curiam* 371 U.S. 37 (1962).

Various unlawful discriminatory practices have assertedly been used by the carriers, such as the refusal to hire or promote minority group members, and even refusing to allow a black applicant to fill out an employment application for future employment. It is alleged that many carriers obtain employees by referrals from incumbent employees and from unions, by pirating employees from other companies, or by absorbing the employees of a company which has moved its terminal or merged with another company. The traditional word-of-mouth referral system is said to be disastrous for women and minorities, because persons familiar with the better jobs are generally white males, who traditionally refer other white males for positions. Other similar practices assertedly include requiring black applicants to take a test with a safety inspector, while fellow employees administer the test to whites. EEOC contends that the law prohibits employment policies which appear neutral on their face but which have the effect of discriminating against minorities and women; and that any employment test must be validated for job relatedness, as such tests have the effect of screening out minorities from employment. Another unlawful practice pointed to by EEOC is the no-transfer policy, whereby trucking companies refuse to transfer a city driver to an over-the-road driving position. One variation allows the transfer, but requires the employee first to resign the present position and apply on the same basis as any other new applicant. The employee would have to sacrifice his accumulated seniority, without any assurance of being hired in the new job or rehired in the old one.

EEOC states that governmental efforts against discrimination in the industry have been largely ineffective. For example, the Equal Pay Act, which is enforced by the Labor Department, requiring all employees performing the same work for a company to be paid the same wages, is of limited scope and effectiveness in the prevention of discrimination. The EEOC has no enforcement powers, and must rely upon the Justice Department for prosecutions against those employers who have a policy or practice which discriminates against a class of persons protected by Title VII. (As noted elsewhere, this has subsequently been changed by legislation.) It has been held that any policy or practice which, even though applied fairly and impartially, has a disparate effect on members of a protected class also constitutes unlawful discrimination unless the practice is compelled by business necessity. The courts have been extremely strict in determining the meaning of "business necessity." Thus, even a clearly neutral policy is a violation of the law if it tends to perpetuate a past discrimination. In order completely to eliminate unlawful discrimination, Federal courts have devised far-reaching and often novel rememdies in order to achieve the desired result. The OFCC of the Labor Department, through its predominant interest agency, the Postal Service, oversees the enforcement of Executive Order No. 11246, with regard to the surface transportation industry. However, the job of the Postal Service is regarded by EEOC as being almost impossible, in view of a substantial manpower shortage and a question as to its actual authority to debar alleged violators from participating in Government contracts.

EEOC represents that the passage of Title VII of the Civil Rights Act of 1964 did not operate to exclude this Commission from the regulation of equal employment opportunity in the transportation industry. This assertedly is revealed in the legislative history of the act, wherein a proposed amendment to make the EEOC the only vehicle by which to combat discrimination was rejected. Title VII, it is alleged, did not serve to displace State agencies, *Norman* v. *Missouri Pacific R. R. Co., supra*, the NLRB, *Local 12, United Rubber Workers* v. *NLRB*, 368 F. 2d 12 (5th Cir. 1966), or the Civil Rights Act of 1966, *Young* v. *International Telephone and Telegraph Co.*, 438 F. 2d 757 (3d Cir. 1971), the OFCC *Contractors Assn. of Eastern Pennsylvania* v. *Schultz*, 442 F. 2d 159 (3d Cir. 1971); or the Federal Communications Commission, 13 F.C.C. 2d 766 (1968).

This Commission, it is argued, not only has ample authority to issue its own equal employment opportunity rules, but has a statutory and constitutional obligation to do so. The national transportation policy, it is contended, enumerates elements of transportation policy which are clearly components of equal employment opportunity. It is argued further, therefore, that because this Commission is charged with carrying out its responsibilities in view of these criteria, it assertedly has jurisdiction to issue regulations concerning them. The national transportation policy requires the "maintenance of reasonable charges for transportation services;" yet the effect of discrimination is to raise the price of labor. Also, it is noted that several sections of the act, such as section 216(d), prohibit unjust discrimination in any respect whatsoever; and that these provisions have been held to apply not only to economic discrimation, but also to that of a racial nature. See *Mitchell*, *Henderson*, and *Boynton*, *supra*. EEOC states that it has long been declared that discrimination is a burden on interstate commerce. It asserts that it is equally clear that employment discrimination in the trucking industry impedes the free flow of commerce; that such employment discrimination inevitably leads to unrest; and that its resultant effects impede the preservation of transportation service. As the act prohibits motor carriers from engaging in or associating with any form of racial discrimination affecting the free flow of commerce, and as a matter of law employment discrimination in the industry has such an effect, it is argued that this Commission is authorized to regulate the employment practices of the interstate motor common carriers. Other statutory authority assertedly may be found in sections 206, 207, and 209 of the act relating to the issuance of certificates and permits. Federal regulatory agencies have been granted broad powers which must be exercised in the public interest. *Scenic Hudson Preservation Conf.* v. *Federal Power Com'n.*, 354 F. 2d, 608 (2d Cir. 1965). EEOC maintains that the scope and content of the public interest is a continuously developing concept, and this has been recognized by this Commission, *Burlington Truck Lines, Inc.* v. *Interstate Commerce Commission*, 194 F. Supp. 31 (D.Ill. 1962), rev'd on other grounds 371 U.S. 156 (1962); that elements not considered in the past may be necessary to accommodate the public interest of today, citing, *e.g.*, *National Bus Traffic Assn.* v. *United States*, 284 F. Supp. 270 (N.D. Ill. 1967), affirmed 391 U.S. 460 (1967); that it also is well established that important national policies are to be considered in any agency's determination of the public interest; that elimination of discrimination in employment is a national policy of the highest priority; and that regulatory agencies have been required to consider antitrust policies, labor-management policies, and the effects of its decision on racial policies. See, as to the latter, ***Shannon* v. *U.S. Dep't. of Housing and Urban Development***, 436 F. 2d 809 (3d Cir. 1970). Finally, it is urged that the precise issue of this Commission's duty to act was determined in a 1971 case which held that because the company is a public utility pursuing an essentially governmental function, guaranteed a stated return on its investment, and regulated in the public interest, the District of Columbia Public Service Commission had authority and power to examine its employment practices.

According to EEOC, an agency must take a national policy into consideration before making a determination of any kind, and failure to do this is reversible error. Furthermore, it is assured that the fifth amendment imposes on the Government and its agencies a duty not to discriminate; and that although there must be some degree of Federal involvement, there is no requirement that the Government be an active participant in the private action, citing the ***Burton*** case, ***supra***; and ***Seidenberg* v. *McSorleys' Old Ale House***, 308 F. Supp. 1253 (S.D. N.Y. 1969). EEOC avers that there clearly is involvement of a public character between this Commission and the carriers it regulates; that this Commission has the power to issue, qualify, modify, amend, and revoke certificates, and thus determine which motor carriers will enter the industry and the extent of their participation therein; that we have broad powers to inquire into carrier management, to issue regulations, and to require individual reports on any matter we may deem necessary; and that all of these powers must be exercised in the public interest.

EEOC recognizes that this Commission has limited staff which could be devoted full time to this new area, but it believes that merely the issuance of adequate rules would tend to facilitiate EEOC's efforts at achieveing conciliation in many of its own cases.

B. CIVIL RIGHTS ORGANIZATIONS

1. *National Council of Negro Women, Inc.*—The Council, of Washington, D.C., is an organization composed of 25 national organizations and individual members located in 40 States. Citing statistics from "The Negro in the Trucking Industry," by Leone which it seeks to have incorporated into the record in this proceeding, the council avers that broad discrimination continues to exist in the trucking industry, notwithstanding the various laws and regulations; that many blacks who have driving experience have returned from Viet Nam, and trucking employment opportunities should made available to them; and that unions have only recently begun to cooperate with this effort. It states that the Justice Department has filed some 28 suits against trucking companies, alleging that a pattern of discrimination exists in their employment practices; that no other agency has been able to assure fair employment in the trucking industry; and that this Commission should exercise its power to withhold and revoke motor carrier licenses upon proof of discriminatory practices. It represents that inspections should be made and the companies concerned should be immediately required to show cause why their authority should not be revoked.

2. *N.A.A.C.P. Legal Defense and Educational Fund, Inc.*—LDF, of New York, N.Y., is a nonprofit membership corporation formed to assist blacks in securing their constitutional rights through litigation and other legal proceedings. LDF has extensive experiences in discrimination cases arising under the Civil Rights Act of 1964, and at the time of its statement served as counsel in over 20 separate proceedings. It believes that case-by-case litigation to eliminate employment discrimination would require tremendous financial expenditures, whereas the promulgation of rules should provide a far more effective and expeditious means of reaching that result.

LDF's statement makes reference only to the motor carrier industry, and requests that remedial regulations be adopted as to it. Initially, it notes the tremendous growth and financial success of the trucking industry since the end of World War II, and asserts that blacks and other minority group members have enjoyed little, if any, of this success. Voluminous statistical evidence is cited regarding the prevalence of discrimination at every level of employment. It points out that the corporate headquarters of most major trucking firms are located in urban centers, where minority group members often tend to concentrate; and a larger than ordinary proportion of jobs in the industry do not require more than a high school education. Thus, LDF represents that while blacks and Spanish-surnamed Americans should have little difficulty in finding a job in transportation, this is not the case. Blacks are said to represent about 27 percent of the population in the Nation's 25 largest cities; yet a 1967 survey of 395 class I motor carriers showed that only 4.5 percent of their employees were black. A 1966 study by EEOC revealed that blacks accounted for 6.5 percent, and Spanish-surnamed individuals for 2.4 percent, of the jobs in the motor freight transportation and warehousing industry. A study of 48 standard metropolitan statistical areas (SMSA) found that 7.6 percent of trucking industry employees were black. LDF states that the difference between the 4.5 figure and the 7.6 figure is attributable to the fact that the SMSA study included smaller carriers who are in search of cheaper labor, and thus may be less restrictive in their employment practices. In the Northeast, blacks constitute 9.8 percent of the overall work force, but only 1.4 percent of trucking industry employees. In the South, the percentage of blacks employed is greater, but this is attributed to the carriers' desire to pay lower wages and to keep out the unions.

LDF represents that a statistical breakdown by employment categories shows patterns of discrimination even more clearly. The 1966 EEOC report and the 1967 survey of 395 class I motor carriers revealed that less than 1 percent of the white-collar workers in the industry were black, but that blacks constituted 10.7 percent of the laborers and 23 percent of the service workers. Of 53.6 percent of trucking employees in higher pay categories, only 4.6 percent were black. These statistics assertedly show on their face that minority group members are employed only at the lowest paying and most menial jobs. One survey of 40,000 over-the-road drivers found only 1 percent to be minority group members; another survey of 21,000 drivers employed by major firms found 1.4 percent; and an EEOC survey of about 17,000 drivers found that only 0.6 percent were black. In contrast, in the Postal Service where discrimination does not exist, blacks constitute 63 percent of the over-the-road drivers. Admittedly, however, certain minor improvements have been made in the industry during the last few years. Of almost 8,000 white-collar workers hired, 3.5 percent were black; but blacks did not account for about one-quarter of the laborers and service workers. LDF argues that despite certain improvements blacks and other minority group members continue to be hired primarily for the low-pay and low-status positions.

Numerous court and administrative proceedings, both final and pending at the time of filing of this statement, are cited to illustrate the many types and severity of discrimination against minority group members. Several discriminatory practices have been noted in these cases. One is the "no-transfer policy" which prohibits transfers from one job to another. It points out that, in some firms, job transfers are permitted, but only after the employee resigns from his present job, relinquishes all seniority and other benefits, and applies for the position as a new employee, without any guaranty of being hired for the new position, or of getting back the old one, citing the *Jones* and

Bing cases, *supra*. The no-transfer policy has been applied to city and line-haul drivers, the latter being the better paid, more prestigious, and the least available to minority group members. In *Jones*, it was asserted that the no-transfer policy was being used to discriminate against certain employees solely because they were black, and an EEOC investigation found reasonable cause to believe Lee Way Motor Freight, Inc., guilty of racial discrimination. Reversing a district court, the circuit court found that, although the no-transfer policy was applied to both blacks and whites, racial factors were involved in their initial employment, and, therefore, served to make the policy discriminatory as to blacks because it tended to lock them into their existing positions because of past discriminatory policies. To the argument that this policy was required by business necessity, the court replied that bad experiences could be alleviated through proper screening, and that alleged training costs were illusory. The *Bing* case, *supra*, was similar. There, the court looked at statistical evidence and stated that "in the problem of racial discrimination, statistics often tell much, and courts listen."

The legality of a number of other practices either has been or is currently being litigated. One employee was promoted to the position of driver, but was ordered by this doctor to return to his former position. The company assertedly would allow him to do so only after forfeiting 15 years of seniority, although no such penalty had been imposed on white employees doing the same.

Some companies simply refuse to hire blacks, or to promote them to better jobs, without giving any reason. Where one carrier had no blacks among over 300 over-the-road drivers and only 2 blacks of 76 city drivers, a Federal district court entered a preliminary order requiring the hiring of blacks in both positions. *United States* v. *Central Motor Lines, Inc.*, 325 F. Supp. 479 (W.D.N.C. 1970). In *Roadway, supra*, it was alleged that of 9,000 employees, only 2 office or clerical workers were black, and that the remaining 286 blacks were employed as garage, service, or dockworkers, and pickup-and-delivery drivers. Of 3,400 over-the-road drivers and managers, professionals, and sales personnel, none was black. Roadway was accused of (1) failing or refusing to hire blacks on the same basis as whites, (2) always assigning blacks to lower paying jobs, (3) perpetuating separate lines of progression based on race, and (4) refusing to promote blacks according to the same criteria as whites. In proceedings against other carriers, it is alleged that the motor carrier refused even to accept a job application from a black, while a white person's application was accepted and he was subsequently hired; that the company regularly refused to promote more experienced black employees to higher paying jobs, while promoting newly hired white employees instead; that the company's departments are segreagated by race, with no black supervisors and no black women employees; and that seniority and promotion policies have the effect of depriving black employees of opportunity for advancement. Thus, while company executives assert their willingness to hire blacks if qualified blacks would only apply, the LDF believes it to be clear that the limited minority employment in the trucking industry today represents tokenism.

Other discriminatory practices allegedly include: failure to pay blacks the same wages as whites; refusal to admit blacks to any on-the-job or apprenticeship training programs; conditioning promotion of black employees on successfully passing a test that is not required to be taken by whites for similar promotion; requiring blacks to learn new jobs on their own time, but promoting whites without any training; offering certain opportunities only to white drivers, and refusing route requests of black drivers while awarding preferred routes to whites who do not even request them; and taking retaliatory action against employees who complain of discriminatory practices.

In short, LDF takes the position that when minority group members apply for a job in the trucking industry, they are discriminated against. If hired, they are intentionally placed in menial and low-paying jobs without hope of advancement. If they complain, they are fired.

These discriminatory practices, according to LDF, are violative of Federal laws, including Executive Order No. 11246, requiring all Federal contractors not to discriminate in their employment practices, and to undertake "affirmative action" programs to assure that these policies are followed in all areas of employment; Title VII of the Civil Rights Act of 1964; the Civil Rights Act of 1866; the fifth amendment, which courts assertedly have held to prohibit entities which are federally licensed or subject to substantial Federal regulation, or are parties to Federal contracts, from discriminating in any manner in any of its activities which involve the Federal Government; and the national transportation policy, which is directed to encouraging and maintaining reasonable charges for transportation, "without unjust discrimination, undue preferences or advantages," and encouraging "fair wages and equitable working conditions." As to the latter, a Labor Department study has assertedly concluded that discriminatory employment practices are actually unprofitable to the motor carrier industry, and, therefore, work against the maintenance of reasonable charges for transportation.

Despite these statutes and the violation of them, LDF states that no existing agency is equipped to attack the problem, while the courts can work only on a case-by-case basis. As a consequence, this Commission allegedly is the only governmental agency with the "statutory tools and equipment to promulgate effective rules in this area."

As to the Commission's jurisdiction, LDF notes that we have the power to issue, qualify, modify, amend, and revoke motor carrier operating authorities, and thus determine who will enter the field and their scope of operations. The Congress has granted this Commission broad power to inquire into the management of carriers (section 204(a)(7) of the act, 49 U.S.C. 304(a)(7)), to issue regulations as to their operations (section 204(a)(6) of the act, 49 U.S.C. 304 (A)(6)), and to require individual reports or information this Commission may deem necessary (section 220 of the act, 49 U.S.C. 320). It urges us to exercise these powers with a view towards "promoting and protecting the public interest." While the act does not enumerate the factors to be considered in promoting and protecting the public interest, it assertedly is clear that those factors encompassed in the national transportation policy should be considered. The duty to prevent "unjust discrimination, undue preferences or advantages" towards any individual and "to encourage fair wages and equitable working conditions" establishes, to LDF, the proposition that promotion of fair employment practices is an integral part of the national transportation policy. Further, it is argued that the Civil Rights Act of 1964 made an explicit determination that discriminatory employment practices constitute a burden on interstate commerce.

LDF maintains that the Supreme Court has affirmed this Commission's authority to promulgate the rules, it suggests, citing *Mitchell* v. *United States, supra,* which states that "*** there is no basis for the contention that Congress intended to exempt any discriminatory action or practice of interstate carriers affecting interstate commerce which it had authority to reach." 313 U.S. at p. 95. While the *Mitchell* case, *supra,* deals mainly with section 3(1) of the act, 49 U.S.C. 3(1), it is urged that that case is equally applicable to motor carriers under section 216(d), 49 U.S.C. 316(d), citing *Georgia* v. *United States,* 201 F. Supp. 813 (N.D. Ga. 1961), affirmed 371 U.S. 9 (1962). According to LDF the latter case noted that case-by-case action initiated by individual complaints was not sufficient to provide an adequate remedy; and no distinction can be drawn between the promulgation of rules in the use of vehicles and facilities used in interstate commerce, and the promulgation of rules requiring nondiscriminatory employment practices in those vehicles and at those facilities.

LDF maintains that this Commission should promulgate rules requiring carriers to show nondiscrimination in their employment practices for various reasons: First, it is believed to be the agency best equipped to deal adminstratively with the problem. The National Labor Relations Board assertedly is limited to unfair labor practices and the lack of fair representation under the collective bargaining system. The power of the Office of Federal Contract Compliance (OFCC) extends only to those carriers who are parties to Government contracts. No company has ever been debarred from contracts by the OFCC, and that Office's authority to compel industry reform is said to be doubtful in any event. The EEOC, as then empowered, has no enforcement powers, and must rely largely either on suits by private litigants to redress grievances or upon the Justice Department to file suit. Fair employment commissions are found in over 30 States and several cities, but these commissions are territorially limited as to jurisdiction and vary greatly in their effectiveness. Nor can the courts handle the problem alone. Courts must work only on a case-by-case basis, and the trial process is often time-consuming and very expensive. On the other hand, it points out that this Commission was created to deal specifically with problems in the transportation industry, and its expertise and experience can be brought to bear upon the difficult problems that will arise. Also, its extensive regulatory control over the industry makes this Commission the only governmental agency able to deal with the industry from a position of power. Finally, we are said to have the manpower necessary to supervise activities of the industry.

LDF avers that the rules it proposes will work to coordinate and assist the efforts of the various governmental agencies concerned with minority discrimination in the trucking industry. In addition, adoption of the rules assertedly will enable employers desirous of complying, to do so without injurious reprisals from employees or unions. Furthermore, this Commission allegedly has an affirmative duty to promulgate rules aimed at eliminating racial discrimination, citing *Scenic Hudson Preservation Conf.* v. *Federal Power Comm'n., supra,* and *Interstate Commerce Commission* v. *Chicago R. I. & Pac. Ry. Co.*, 218 U.S. 88 (1970). By continuing to permit employers to maintain their present practices, LDF argues that this Commission will be aiding and abetting the trucking industry in violating the act and the law of the land.

LDF notes that the FCC has already attacked this problem by issuing regulations regarding equal employment opportunity by its licenses; that the "public interest, convenience and necessity standards for the issuance of ICC licenses would seem to imply a requirement that the applicant be law-abiding," citing *Federal Communications Commission* v. *American Broadcasting Company,* 347 U.S. 284, 289 (footnote 7) (1954); and that major trucking companies cannot maintain discriminatory employment policies and legally continue to operate in interstate commerce. To sever itself from this unlawful partnership, this Commission is urged to issue and enforce appropriate rules and regulations.

Moreover, it is argued that the fifth amendment to the Constitution requires this Commission to forbid discrimination in the trucking industry. This constitutional argument runs as follows: Clearly, the Federal Government, and its various agencies, are prohibited from engaging in discrimination. The Government need not be the sole, or even the principal actor in such discrimination; all that is needed is a significant degree of governmental involvement. In one instance a court found a violation of the fourteenth amendment when a State liquor authority licensed a private club that refused to serve blacks. The decisive factor was the uniqueness and all-pervasiveness of the State's regulation. *Irvis* v. *Scott*, 318 F. Supp. 1246 (M.D. Pa. 1970).[3] See also *Simkins* v. *Moses H. Cone Memorial Hospital*, 323 F. 2d 959 (4th Cir. 1963) cert. denied 376 U.S. 938 (1964); and *Citta* v. *Delaware Valley Hospital*, 313 F. Supp. 301 (E.D. Pa. 1970). The fact that a private restaurant leased its premises from a public agency was held sufficient to impose a duty upon the lessor to forbid its lessee from discriminating in the customers it would serve. *Burton* v. *Wilmington Parking Authority, supra.*

Appended to LDF's statement are certain proposed rules which it believes we should promulgate. Those rules are reproduced in their entirety in appendix II to this report.

3. *Mexican-American Legal Defense and Education Fund.*—MALDEF, of San Antonio, Tex., is a nonprofit corporation organized primarily to litigate civil rights issues involving the Nation's second largest minority. Having filed numerous lawsuits against large private employers, it believes that the transportation industry and transportation unions have been the most blatant abusers of the doctrine of equal employment opportunity. It represents that activities serving to impede the free flow of commerce are subject to regulation by this Commission and that the discriminatory practices of carriers and unions constitute such an impediment, in the form of intracompany disruption and public activity that disrupts the regular business activities of employees engaged in interstate commerce.

MALDEF contends that the formulation of equal employment opportunity regulations by this Commission clearly would come within the national policy of eliminating discrimination. As evidence of discrimination, MALDEF cites employment statistics of two motor common carriers: one company employs 147 over-the-road drivers at its Albuquerque, N. Mex., terminal, none of which is black or Mexican-American, although all 7 city drivers employed at that terminal are Spanish-surnamed. The other carrier has 415 line-haul drivers, none of which is black or Mexican-American, although more than half of its 335 city drivers are black or Spanish-surnamed.

MALDEF asserts that this Commission's extensive knowledge of and power over the surface transportation industry makes it uniquely able to combat discriminatory practices.

4. *Leadership Conference on Civil Rights.*—The conference, of Washington, D.C., is a coalition of 127 national civil rights, labor, religious, and civic organizations dedicated to the achievement of equal opportunity and the advancement of civil rights. It is in agreement with the position taken and rules proposed by LDF, *supra.* The conference at the time of filing was then waging a national campaign to obtain better enforcement of civil rights laws by the Federal Government and full recognition of civil rights responsibilities by Federal regulatory agencies.

C. INDIVIDUALS

1. *Ralph B. Matthews.*—Mr. Matthews, of Atlanta, Ga., asserts that this Commission has no jurisdiction to deal with discriminatory employment practices of the carriers regulated by it. He notes the authority of this Commission to inquire into and report on the management of all carriers; to regulate rates and services of the carriers; to issue additional operating authority; to regulate abandonment of rail lines; and to

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[3] Rev'd *sub nom., Moose Lodge No. 407* v. *Irvis*, 407 U.S. 163 (1972).

prevent undue and unjust discrimination. With regard to the latter, however, he argues that the statute refers to service and not to employment practices. He points out that the Elkins Act (49 U.S.C. 41), which is an integral part of the Interstate Commerce Act, clearly defines discrimination only in terms of service to the public.

The EEOC has jurisdiction over employment discrimination practices in all industry, whereas this Commission assertedly has no control over the internal affairs of any carrier except in regard to records kept, operations performed, services rendered, and the routes used. This Commission, it is averred, is a creation of the Congress and has only the powers bestowed upon it by legislation, *New York Central Railroad Company* v. *United States*, 267 F. Supp. 619 (S.D.N.Y. 1967). As such, Mr. Matthews maintains that we are not empowered to dictate wage or working conditions, nor are we authorized to establish or change the employment practices of the carrier.

2. *Eileen Schneider, Reuben B. Robertson III, and David Bonderman.*—Ms. Schneider et al. all of Washington, D.C., assert that this Commission not only has, but is legally required to exercise, the power to eradicate discriminatory employment policies in the industry it regulates, and that the motor carrier industry is a traditional and consistent violator of the equal employment policies of the United States. They say that the national transportation policy directs this Commission to administer the provisions of the act so as to "promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers and to encourage fair wages and equitable working conditions;" that there is growing evidence that discriminatory employment practices are actually unprofitable, as well as unjust and detrimental to the minority group members and women who suffer from such practices; that a then recent Labor Department study concluded that the trucking industry could overcome chronic manpower shortages and high employee turnover by recruiting and training workers from the inner-city's untapped labor pool; and that this disservice is passed on to the public in the form of less efficient operation and higher transportation prices. In addition, they contend that the Congress has expressly determined that discriminatory employment practices per se constitute an undue burden on interstate commerce, citing Title VII of the Civil Rights Act of 1964; and *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937). As it is the duty of this Commission to facilitate interstate commerce, they deem it necessary and appropriate for this Commission to remove such impediments as may arise from illegal and "diseconomic" management policies and practices within the regulated industries. With regard to the mandate to encourage fair wages and equitable working conditions, they aver that this Commission has taken no effective action; and that as an integral part of the national transportation policy, this Commission has clear authority to exercise its powers to adopt appropriate rules and regulations and to take such additional action as is required to eliminate discrimination within the surface transportation industry, citing *Schaffer Transportation Co.* v. *United States*, 355 U.S. 83, 88 (1957). Inasmuch as we may not in our discretion ignore or frustrate the stipulated aims of the national transportation policy, they believe that this Commission must take affirmative action to eliminate the undue burdens of discriminatory employment practices.

This Commission, they aver, has power to issue, amend, qualify, and revoke certificates; to control mergers and changes of ownership; to exercise a ratemaking function; to enforce standardized reporting and accounting requirements; to inquire into the management of motor carriers; to issue regulations as to their operations; and to require reports on any information this Commission deems necessary. All of these powers assertedly must be exercised with a view toward promoting and protecting the public convenience and necessity. While the factors necessary for determining such public interest are not specified, they believe it to be clear that the broader environmental and social effects, beyond mere questions of competitive impact and adequacy of existing facilities, are relevant in such determinations; and they cite various judicial decisions which allegedly have removed any doubt that this Commission may and should exercise a broad-ranging inquiry in ascertaining the public interest. *Petroleum Carrier Corp.* v. *United States*, 258 F. Supp. 611 (D. Fla. 1966); *Campbell Sixty-Six Express, Inc.* v. *United States*, 258 F. Supp. 528 (D. Mo. 1966), et al. *Burlington Truck Lines, Inc.* v. *Interstate Commerce Commission, supra*, is cited for the proposition that this Commission has the power to inquire into a carrier's employment practices and to evaluate such findings in making public interest determinations.

They find precedent for the proposed regulations in those already established by the FCC in this area. Although this Commission has broad discretionary authority, they aver that such power must be exercised in conformity with the declared policies of the Congress; that the public interest is a constantly evolving concept; that conduct and activities formerly regarded as private have become matters of vital public concern; that a grant of interestate motor carrier operating authority confers on the private operator certain privileges, including use of public highways and the right to a partial monopoly; and that recipients of such public largesse must meet the highest standards embraced in the public interest. They argue that, by enacting the Interstate Commerce Act, the Congress sought to abolish the evil of discrimination, and did not intend to exempt any form of discriminatory practice.

The discrimination provisions of the statute are not, they represent, restricted in any sense to economic discrimination or to discriminatory practices in services or accommodations, as opposed to employment or other functions; indeed, they state that the statutory language explictly prohibits discrimination, prejudice, or disadvantage "in any respect whatsoever," and that the *Mitchell* and *Henderson* cases make it clear that this applies to racial discrimination. In addition, they recognize that this Commission has found that racially assigned seating and other discriminatory practices causing "feelings of inferiority" are unlawful. *Keys* v. *Carolina Coach Co.*, 64 M.C.C. 769 (1955); and they assert that the same reasoning should extend to employment practices as well. They further maintain that if this Commission is concerned about psychic injury which arises from a carrier's discriminatory practices, we should *a fortiori* address ourselves to the same carrier's practices which create the actuality of economic inferiority through the real and direct economic injury of being denied an equal and fair opportunity to compete for employment.

Federal civil rights enforcement efforts are not, Ms. Schneider et al. contend, the exclusive responsibility of the EEOC, the U.S. Commission on Civil Rights, or the Justice Department. They believe that the legislative history of the Civil Rights Act of 1964 makes this clear, for a proposed amendment restricting jurisdiction was defeated. They also cite *Colorado Anti-Discrimination Commission* v. *Continental Air Lines, supra*, to support this proposition. Nor are these parties aware of any challenge to the regulations adopted by the FCC.

Ms. Schneider et al. contend that this Commission has an affirmative constitutional duty to eliminate discrimination in industries under its regulatory jurisdiction; that the fifth amendment prohibits the Federal Government and its agencies from discriminating in the granting of job opportunities, *Bolling* v. *Sharpe, supra;* that while purely private conduct abridging individual rights does not violate the Constitution, when the activities take on a public character or are related to or dependent upon the State or its agencies, the conduct becomes State action subjecting the parties to constitutional strictures; and that there need only be significant State involvement. *Burton* v. *Wilmington Parking Authority, supra.* See also the *Simkins, Citta,* and *Irvis* cases, *supra.* They point out that in the employment field the fourteenth amendment has been held to bar construction contractors under contract with the State from hiring through unions that barred blacks from membership. *Ethridge* v. *Rhodes,* 826 F. Supp. 83, 88 (D. Ohio 1967), and that it has long been held that when the State permits private parties to conduct essentially governmental functions, they are parties subject to the prohibitions of the Constitution, *Smith* v. *Allwright,* 321 U.S. 649 (1944); and, they aver, that because of the nature of their services, the operation of motor carriers must be considered the performance of a public function.

Ms. Schneider et al. next discuss the assertedly traditional and continuing patterns of discrimination in the trucking industry, and that industry's asserted noncooperation with the equal employment opportunity laws. As evidence that blacks and other minorities are excluded from all job categories, they cite many of the same statistics noted earlier in the initial statement of LDF. Driving classifications (city and over-the-road), they say, are consistently segregated throughout the industry, while comparative employment records of small and large firms allegedly attest to the irresponsibility of the larger firms in implementing equal employment opportunity. They argue that actions against several motor carriers, noted earlier, provide some indication of the more flagrant abuses that are practiced; that even more shocking is a comparison of employment statistics of the private sector with those of the Postal Service, which reports that 63 percent of its road drivers are black; that trucking companies have discriminated in their initial hiring and by refusing to transfer minority group members from the city classification in which they were hired; that word-of-mouth recruitment systems, though found illegal, continue to be widely practiced by trucking companies; and that the Labor Department study referred to earlier found that the standard employment criteria used in the trucking industry, including formal education requirements and test scores, were virtually useless for the purported purpose of employee selection but highly effective in screening out minority applicants. These parties also note some of the discriminatory transfer policies described earlier. While minority employment has increased (*e.g.,* in the first 6 months of 1970, 10.9 percent of newly-hired employees were black), this assertedly was not so of all job classifications and blacks continued to account for a disproportionately high number of low-paying jobs.

They contend that women also have been the victims of pervasive discrimination in the trucking industry. They cite a 1966 survey by EEOC which shows that women represented only about 8 percent of those employed in the motor transportation and warehousing industries.

Ms. Schneider et al. assert that the industry has resisted efforts to enforce civil rights laws, and that Government efforts have been ineffectual; that conciliation conferences in 1968 and 1969 with participants from EEOC, the trucking industry, and the teamsters, resulted in failure; that industry spokesman then claimed that the proposed EEOC solution would mean a disruption of labor relations throughout the industry; and that the failure of this Commission to take such measures as are necessary to assure equal employment opportunity for minorities and women involves this Commission in the unlawful employment practices of what they term a "Fundamentally racist industry." The regulations proposed by these participants are set forth in appendix II to this report.

3. *Elizabeth M. Eckerson.*—Ms. Eckerson, of River Vale, N.J., has been employed by the Traffic Executive Association-Eastern Railroads in various capacities for 39 years. During that time she has worked in a variety of office jobs. She argues that no female has ever been offered any executive or official position with the association, and that all representatives appointed to serve on various committees have been white males. The association is controlled and financed by eastern railroads, under an agreement approved pursuant to section 5a of the act, 49 U.S.C. 5a. The practices and policies of the association assertedly reflect those of each railroad. Ms. Eckerson argues that no recourse from these policies was available until enactment of equal employment opportunity laws, and she asserts that, even now, compliance is a farce. A complaint filed with the EEOC was referred to a State agency, which held hearings resulting in confirmation of her allegations. The EEOC set her case for hearing, but no date had yet been designated at the time of filing this statement. Ms. Eckerson feels that *findings* of discrimination will not be enough to change the practices of the railroads. She notes the present financial difficulties experienced by the railroad industry, and asserts that management must be forced to reevaluate itself if improvement is to result.

The usual reasons for failure to promote women are said to be: "no rate experience"; "not enough seniority"; and "out of the department." But, she points out, these requirements are waived time and again for white males. Ms. Eckerson asserts that although her employer has made a few changes, they involved minor jobs and were merely "tokenism." Considering the difficulty she has had in her attempt to "buck the industry," she believes that individual efforts to change such major policies are futile. Ms. Eckerson represents that any law or regulation dealing with equal employment opportunity must have the teeth necessary to force real and affirmative action, and she feels that this Commission has the power to bring about the desired result of fair employment opportunities for all persons within the industry.

4. *James A. Kirk.*—Mr. Kirk, of Costa Mesa, Calif., is a private citizen having no commercial connection with any carrier. He alleges that Global Van Lines, a Commission-licensed motor carrier of household goods, continues unlawfully to advertise in sex-segregated employment columns, but that a complaint filed with the EEOC prior to the filing of this statement had yet to be answered. Mr. Kirk asserts that the statement by the Oil Field Haulers, infra, that it and its members do not practice discrimination, should not be believed without an extensive investigation because of the subjective nature of discrimination. He suggests the imposition of a minimum fine of $10,000 for each offense, to cover the cost of such investigation.

5. *Velta L. Erdmanis.*—Ms. Erdmanis, of Denver, Colo., is a private citizen who is an employee of longstanding in the transportation industry. She asserts that the language of the national transportation policy, providing for "fair and impartial regulation of all modes of transportation *** so administered as to *** encourage fair wages and equitable working conditions" should be interpreted to encompass all personnel. She states that the transportation industry is a known offender which offers desirable career positions only to males, some of whom have had no prior training. She notes that an aggrieved employee has recourse to several Federal and State agencies, but argues that these are followed by reprisals and pressure from management.

6. *P. W. Ewing.*—Ewing, of Riverdale, Ill., has tendered into evidence a reproduction of a pamphlet offering benefits to railroad workers. The pamphlet, issued by the Railroad Retirement Board, contains material indicating that benefits to male employees are different from those available to female employees.

7. *Theresa Jane Ste. Marie.*—Ms. Ste. Marie of Eastchester, N.Y., has worked for the Traffic Executive Association-Eastern Railroads for about 19 years. Although she held the title of clerk, she assertedly performed various jobs of much greater responsibility. She alleges that during the period of her employment, only one woman has held a position of importance; and that said woman did not receive the salary of an executive, and, in fact, her salary was even less than the salary of men in positions of far less responsibility. Ms. Ste. Marie contends that men are also accorded various side benefits, the criteria for which are more strict for women. She has complained to her superiors, as well as to State and Federal agencies, without success, and, in fact, has had work taken away from her. Ms. Ste. Marie believes that better rail service would result if laws dealing with equal employment opportunities in the railroad industry were strengthened. She, therefore, requests this Commission to take action to help all employees of railroads to obtain equal treatment.

D. CARRIERS AND CARRIER-RELATED ORGANIZATIONS

1. *United Van Lines, Inc.*—of St. Louis, Mo., a certificated motor common carrier of household goods, directs its pleadings to the question of whether this Commission, in view of its existing regulatory problems and duties, should involve itself in the promulgation of regulations and an enforcement program supplementary to and duplicative of what it believes to be numerous existing programs maintained by other agencies at the Federal, State, and local levels. United is subject to regulations of the U.S. Postal Service, OFCC, the EOCC, Department of Defense, and the Missouri Civil Rights Commission; and it assertedly has been United's practice over the years to hire members and representatives of minority groups. It argues that any program undertaken by this Commission will burden the agency, the carriers, and the minority group members with unneeded duplicative functions; and that while the objectives of this proceeding are commendable, the proposal is unnecessary and the proceeding should be discontinued.

2. *North American Van Lines, Inc.*—North American, of Fort Wayne, Ind., recognizes the laudable and worthwhile objectives of this proceeding, but believes that this Commission should not undertake a regulation and enforcement program on its own. North American argues that most carriers are already subject to a number of Federal and State agencies that regulate equal opportunity; and that it alone is regulated by the 10 States in which it has offices, by the EEOC, and by the Contract Compliance Office of the U.S. Postal Service. For several reasons, it believes that no additional regulation is needed. First, any suggestion that this Commission undertake its own program assertedly implies that existing agencies are either unable or unwilling to perform their own statutory duties. North American's experience has been that existing agencies are thorough in their investigation and zealous in their enforcement. Second, it is argued that the performance of duplicating activities would be wasteful for both the public and the Government. Finally, it states that an additional program might actually hinder existing programs by creating jealousy and jurisdictional disputes between the various agencies, thus lessening their overall effectiveness. In support of its views, North American cites a study by the Wharton School of Finance and Commerce entitled "Negro Employment in Land and Air Transport" (1971), in which the authors conclude that there now exists detrimental interagency conflict in the area of equal opportunity in surface transportation.

3. *Oil Field Haulers Association, Inc.*—The association, of Austin, Tex., is a nonprofit corporation serving as a tariff-publishing agent for approximately 300 motor

carriers located throughout the Nation which have authority to haul heavy commodities and other size-and-weight traffic requiring the use of special equipment. It states that neither it nor any of its members practices discrimination; that the contrary has neither been alleged nor reported; that qualification is the sole criterion for employment by these carriers which maintain a continuous training program to fill their needs; and that because there is no discrimination, there have been and there are no violations of law. The association asserts that the matter of discrimination in the employment practices of carriers subject to the Interstate Commerce Act is not within the jurisdiction of this Commission; that where several other agencies are given specific jurisdiction to regulate and enforce civil rights and equal opportunity for employment, the absence of a direct and specific duty assigned by statute is proof of a legislative intent to deny such jurisdiction to this agency; and that this is further emphasized by Public Law 89-670, whereby the regulation of safety and qualifications of personnel was transferred from this Commission to the Department of Transportation (DOT). It avers that the national transportation policy makes no reference to discrimination in employment practices; that this Commission is a creature of statutory enactment, and may not act except in accordance with powers enunciated in the statute; and that part II of the statute (dealing with the regulation of motor carriers) applies only to the procurement and provision of *facilities* of and for transportation, 49 U.S.C. 302, which "facilities" do not include personnel. The employment practices of its members are already regulated by numerous other Federal and State agencies, and participation of this Commission in this field is assertedly unnecessary, even if there were discrimination and we had the jurisdiction to act. The association argues, finally, that additional burdens should not be assumed by this agency when there is no showing that other Federal agencies are deficient, derelict, or delinquent in their duties.

4. *National Association of Motor Bus Owners.*—NAMBO, of Washington, D.C., is the national trade association for the intercity motorbus industry. NAMBO has no information that any motor carriers or passengers discriminate in their employment practices in any way. Its members are proud of their accomplishments and would be willing to open their records for inspection by any duly constituted, responsible body. The association believes the function of achieving equal employment opportunities to have been delegated solely to the EEOC, and that any intervention in this area by this Commission would disregard the tremendous efforts and advancements made by the EEOC. As evidence of these advances, NAMBO points to statistics showing that employment of minorities increased 22 percent between 1960 and 1970, and that their employment in professional, technical, and clerical positions doubled. While this admittedly does not mean that enough is being done, NAMBO asserts that it does show that persons who are discriminated against have duly designated governmental agencies to which they may appeal. The association notes that the unwritten restriction against transfers between city and road drivers, a prime example of discrimination, was declared illegal in the *Bing* case, *supra;* and that it is, therefore, clear that something is being done about discrimination.

NAMBO notes that Title VII of the Civil Rights Act of 1964, as enforced by the EEOC, covers companies with 25 or more employees (later reduced to 15). About half of NAMBO's members, and 97 percent of the total employment of the intercity bus industry, are thus covered by such regulation. It is argued that any regulation as to the remaining 3 percent would not be in the public interest, because the economic burden of complying with too many administrative regulations could not be borne by the carriers. In such small businesses, where many of the employees are relatives of the owners, or are themselves part owners, enforcement would assertedly be difficult, and dissident persons or groups could use the regulations for purposes of harassment. While larger companies can absorb such costs, small firms allegedly cannot. NAMBO's position is that discriminatory employment practices by carriers having less than 25 (now 15) employees does not violate any Federal constitutional or statutory obligation.

NAMBO avers that enforcement of the Civil Rights Act of 1964 is solely the responsbility of the EEOC and the Justice Department, while enforcement of Executive Order No. 11246 is the duty of the Government's so-called primary interest agency (in the case of motor carriers, the U.S. Postal Service). It is alleged that the EEOC has the proper staff and investigative powers to fulfill the function for which it was created; that power to implement Title VII should remain with EEOC and that in addition to Federal laws, many States have their own laws against employment discrimination.

Antidiscrimination clauses in labor contracts, either express or implied, can create an additional area of confusion. NAMBO questions what would happen in a situation involving an employeer who has an employee covered by a labor contract with a discrimination clause and an arbitration clause, and that employee claims he has been discriminated against. Would the employee go to arbitration, the EEOC, or the ICC? And would relief from one bar relief from any other? The association argues that there is already enough overlapping jurisdiction between the National Labor Relations Board and the EEOC without further compounding the problem.

An additional practical problem alluded to by NAMBO would be the effect of a new and different area of regulatory responsibility on this Commission's staff and workload. This Commission, which is already overburdened, allegedly does not have enough money, personnel, expertise, or time properly to enforce any regulations it may propose. NAMBO is therefore of the opinion that we should not become involved in promulgating rules and regulations in this area.

5. *American Trucking Associations, Inc.*—ATA, of Washington, D.C., is the national organization of the trucking industry representing both for-hire and private carriers of freight. It argues basically that this Commission has no legal authority or responsibility to promulgate equal employment opportunity regulations; and that, even if such authority exists, it would be impractical for this Commission to assume the burden of ensuring nondiscrimination in the hiring and other practices of the carriers it regulates.

ATA avers that the national transportation policy is not a source of power for this Commission, but rather is a stated policy which will "govern the Commission in the administration and enforcement of all the provisions of the act" and "is the yardstick by which correctness of the Commission's decisions will be measured," citing *Schaffer Transportation Co.* v. *United States, supra.;* and that where the Congress intended this Commission to enter into areas of consideration, it did so specifically, as with certain labor matters set forth in sections 5(2)(c) and 5(2)(f) of the act. Nor does it believe that any such authority lies in the discretionary powers of this Commission to protect the "public interest." It points out that of the nine cases cited in the petition in No. MC-C-7255 to support this proposition, four are cases of other agencies involving the proposition that environmental and social effects should be taken into consideration, and five are cases of this Commission involving the quality or quantum of service. None of the cited cases, ATA points out, has anything to do with employment. It alleges that the only tie between employment practices and transportation service cited in the petition in No. MC-C-7255 is a reference to a

Labor Department study which claims that discriminatory hiring practices are costly and unprofitable to the trucking companies; that the said Labor Department study, however, related only to dockworkers; and that the setting of high employment standards for drivers is neither unprofitable nor unimportant.

Furthermore, ATA points out that those portions of the statute which refer to unjust discrimination, undue or unreasonable prejudice, or disadvantage in any respect whatsoever (and the *Mitchell* and *Henderson* cases, *supra*, which interpret those sections) relate to transportation services provided to the riding public. Similarly, *Boynton* v. *Virginia, supra*, which prohibits discrimination in terminals, is a logical extension of the service principle, and again, assertedly has nothing to do with employment discrimination. In addition, it represents that various other cases, including *Burton*, *Simkins*, and *Irvis*, supra, are service-related cases similar to *Mitchell* and *Henderson*, and have nothing to do with employment discrimination. In two cases, *Ethridge* v. *Rhodes, supra*, and *Todd* v. *Joint Apprenticeship Comm.*, 223 F. Supp. 12 (D. Ill., 1963), which did involve employment discrimination, the Government had entered into contracts for construction of certain buildings, and it was determined that any employment discrimination by the contracting parties was unlawful. Thus, ATA concludes that there is no legal precedent to extend any constitutional duty placed upon this Commission by the fifth amendment to the employment practices of interstate carriers under its regulation.

Even if jurisdiction were found, ATA believes that it would be impractical for this Commission to embark on yet another new course of action. The time consumed in processing applications would be further lengthened; the docket would be clogged with new proceedings; and existing agencies of Government assertedly have the means and methods of correcting any inequities which may be found to exist. Where gaps in enforcement exist ATA represents that the more logical approach would be to seek amendments to the laws or regulations under which these bodies operate. In any event, it points out that the most effective procedure for obtaining redress against discrimination has been the bringing of a lawsuit against the employer and the union representing the employees of that company; and that the hardship on the individual may be eased in view of the existence of free legal aid organizations to assist in bringing such suits. ATA concludes that the Interstate Commerce Act is not a fair employment practices act, and has never been utilized as such. Rather, the basic purpose of that statute, according to ATA, is to foster a sound transportation system.

6. *Central and Southern Motor Freight Tariff Association, Incorporated.*—The association, of Louisville, Ky., is agent for motor common carriers of property participating in its tariffs, and submits its statement to the extent any issues are raised in this proceeding under section 216(d) of the act, 49 U.S.C. 316(d). The association states that motor common carriers of property were named as respondents in the instant proceeding on the basis of the national transportation policy and section 204(a)(1), (6), and (7), and 216(d) of the act. It maintains, however, that there is nothing in section 204 even remotely relating to regulation of employment practices of motor carriers and their agents; that the regulatory jurisdiction of this Commission with respect to motor carriers is set forth in section 202(a); that such jurisdiction pertains only to transportation services and to facilities used in the performance of such transportation; and that a reading of section 216 leads to the inescapable conclusion that it relates only to rates, fares, charges, classifications, rules, regualtions, and practices relating to the transportation of passengers or property, citing *Artic Roofings* v. *Travers*, 32 A. 2d 559 (1943).

The association argues that the national transportation policy gives policy guidance to this Commission and is not substantive in character; that the statement in the national transportation policy regarding fair wages and equitable working conditions does not broaden the substantive powers of this Commission and does not modify the meaning of section 216(d); and that if the Congress had wanted this Commission to regulate employment practices, it would have made appropriate provision in the act or in one of the amendments to it. The association asserts that all arguments regarding the need for and probable benefits of such action have no bearing on the principal fact that this Commission has no jurisdiction to enter this aspect of regulation.

7. ***Railway Labor Executives' Association*** and ***Congress of Railway Union.***—These parties, both of Washington, D.C., are unincorporated labor organizations affiliated with most of the standard railway labor organizations representing persons employed by the rail carriers. They urge this Commission to sever the issues in this proceeding and curtail the scope of any investigation until we determine that we have the jurisdiction to deal with discriminatory employment practices. They believe it to be well established that this Commission derives its power solely from the act; that we have "no roving commission to carry out the policy of Congress"; and that we cannot function "independently of some duty imposed or authority created by the Act." ***Kansas City S. Ry. Co.*** v. ***Kansas City Term. Ry. Co.***, 211 I.C.C. 291, 298 (1935), affirmed ***U.S.*** v. ***Interstate Commerce Commission***, 18 F. Supp. 94 (D.D.C. 1937), affirmed 98 F. 2d 268 (D.C. Cir. 1938), cert. denied 305 U.S. 625 (1938). They say that even the most liberal construction of the national transportation policy could not conclude that the Congress intended to deal with discrimination in employment when it drafted and enacted that legislation; that none of the sections specified in the Notice of Proposed Rulemaking and Order remotely involves employment discrimination; that those sections relating to preferences, prejudice, advantage, disadvantage, and discrimination have always referred to the shipper-carrier relationship, never the employer-employee relationship; and that no authority is cited in the Notice because none exists.

The labor representatives assert that while there are numerous other Federal laws dealing with discriminatory employment practices, none of those statutes grant this Commission authority to deal with this aspect of regulation and that, in several recent pronouncements, we ourselves have rejected any contention that we have jurisdiction over carrier's discriminatory employment practices. See ***St. Louis—S.F. Ry. Co Discontinuance of Trains***, 327 I.C.C. 438, 458-459 (1965); and letter from Chairman Stafford to Howard A. Glickstein, Staff Director, U.S. Commission on Civil Rights, as quoted in "Report to the President," U.S. Commission on Civil Rights, September 1970, p. 839.

It is pointed out that the Civil Rights Act of 1964 vested certain mediation and enforcement functions in the EEOC and the Justice Department. Other functions have been assigned to the OFCC of the Labor Department, and the U.S. Commission on Civil Rights. These parties believe that the Congress would not have made provision for such functions if it had already granted or intended to grant to this Commission authority to deal with employment practices of the carriers. They feel that the conclusion is inescapable that regulation in this area has been given exclusively to agencies other than this Commission.

8. ***Freight Forwarders Institute.***—The institute, of New York, N.Y., is a voluntary membership association representing a substantial number of freight forwarders subject to regulation pursuant to part IV of the act. It asserts that a review of the Interstate Commerce Act does not indicate any basis for assumption by this

Commission of jurisdiction over the employment practice of the transportation companies it regulates; and that, even if such jurisdiction could be found, it should not be exercised. It points out that various State and Federal agencies already exercise jurisdiction over the employment practices of transportation companies; and it maintains that no purpose could be served by adding yet another layer of regulatory scrutiny over these practices. The institute feels that this Commission has more immediately pressing problems to which its attention should be directed and over which its jurisdiction is more clearly defined.

9. *Association of American Railroads.*—AAR, of Washington, D.C., whose members constitute substantially all class I railroads in the United States, represents that it has long been the policy of the railroad industry to recruit, employ, and promote at all locations and for all vocational levels without discrimination; that the industry has cooperated with various levels of Government and has instituted positive action to achieve the goal of equal employment for all individuals; and that the nationwide railroad Committee on Equal Employment Opportunity has been held up as a model by Federal officials, who have urged other industries to establish similar committees, and has served as a forum for Government officials to appear and give direction to the railroad industry. While substantial progress has been made, the railroads recognize that opportunity for further improvement exists, and it is in this spirit that AAR has submitted its statement.

AAR asserts that the preliminary question to be decided is one of jurisdiction, and it requests severance of that issue from all other issues; that this Commission lacks jurisdiction over carrier's employment practices; that this Commission's powers are purely statutory; and that even though some general congressional or national policy might be discerned, this Commission has no authority to effectuate that policy unless there is an express grant of power by the Congress to this Commission. *Kansas City S. Ry. Co., supra.* While the railroads are well aware of the national policy of equal employment opportunity for all, AAR maintains that the Congress has at no time and in no statute given this Commission specific jurisdiction to carry out that policy; that the statutory provisions relied upon in the Notice of Proposed Rulemaking and Order do not confer the necessary jurisdiction on the Commission; that the national transportation policy is merely a yardstick for measuring the correctness of Commission action (see the *Schaffer Transp. Co.* case, *supra);* and that the discrimination sections of the act apply only to shipper-carrier relations, not to employment. *Barringer & Co.* v. *U.S.*, 319 U.S. 1, 6 (1943); and *Wisconsin R. R. Commission* v. *C. B. & Q. R. R. Co.*, 257 U.S. 563 (1922). In fact, AAR states that this Commission has expressly rejected contentions that it apply the discrimination sections to carriers' employment practices. *St. Louis—S. F. Ry., supra.* In addition, sections 12(1), 204(a)(6) and (7), and 403(a) and (3) of the act, and 5 U.S.C. 553 and 559 assertedly confer on this Commission authority merely to inquire into the management of regulated carriers in order to perform the duties and carry out the objects for which this Commission was created; those provisions do not confer any jurisdiction over any substantive areas of regulation, nor do they extend the powers of this Commission to make inquiries beyond the areas defined in the substantive sections of the act. AAR notes a California case which, it asserts, is persuasive support for its position here. *NAACP, Western Region, et al.* v. *All Regulated Public Utilities*, Cal. PUC Case No. 9090, decided October 6, 1970, writ of review denied, *NAACP, Western Region, et al.* v. *Public Utilities Commission*, unreported, Cal. Sup. Ct. April 29, 1971.

Even if this Commission has jurisidction, the AAR believes that such power should not be exercised here in view of the large number of existing laws and agencies involved in regulating railroad employment practices: (1) The railroads would be required to expend even more time than they already do in meeting the various administrative requirements, and this Commission would be overburdened by this additional workload. (2) Various agencies already are specifically vested with authority in the area of equal employment opportunity, and entry of an additional agency can only result in needless duplication of work. (3) The Railway Labor Act has long been a factor in eliminating discriminatory employment practices. 45 U.S.C. 151 *et seq. Steele* v. *Louisville & N.R. Co.*, 323 U.S. 219 (1944); *Brotherhood of Railroad Trainmen* v. *Howard*, 343 U.S. 768 (1952); and *Virginia R. Co.* v. *System Federation, No. 40*, 300 U.S. 515 (1937). In view of this Commission's asserted lack of jurisdiction in this area, AAR requests that this proceeding be discontinued.

REPLY STATEMENTS

1. *United States Commission on Civil Rights.*—The Civil Rights Commission reaffirms its view that this Commission has both the power and the duty to assure that nondiscrimination is practiced by its regulatees. It maintains that there is an urgent need for action, and that this Commission can contribute significantly to this area. It feels that existing agencies, including the EEOC and OFCC, are too severely limited both as to jurisdiction and sanctions available. To achieve meaningful results, the Civil Rights Commission further notes that issues other than equal employment opportunity, such as barriers to minority entrepreneurship and the avoidance of discrimination in services by regulated carriers, have not been addressed by the parties, although they should also be considered.

2. *Eileen Schneider, Reuben Robertson, III, and David Bonderman.*—These parties filed a joint reply statement in which they have compiled additional factual data regarding employment statistics of one of the Nation's largest carriers, in response to allegations of lack of discrimination by certain industry respondents. The figures show that minority group members constitute only 1.2 percent of the carrier's 1,072 line drivers, and 7.1 percent of its city drivers, and 7.1 percent of its employees in all positions across the country. In addition, these parties have assembled a list of over 200 civil rights cases filed against carriers subject to ICC jurisdiction. These cases were pending at the time of filing herein, and others were being filed at the rate of about six a month; yet they contend the number of cases filed does not even begin to compare with the number of complaints against the industry received by the EEOC and other agencies.

3. *Equal Employment Opportunity Commission.*—EEOC notes that disclaimers by industry representatives herein about employment discrimination are rebutted virtually on their face by the statistics discussed in the initial statements. In addition to this Commission's specific authority to regulate, EEOC states that we have more general authority to regulate in the "public interest"; and that this term is a continually developing concept now including social and environmental factors. According to the EEOC, the fifth amendment to the Constitution also requires this Commission to assure equal employment opportunity within the industry; and because the Federal Government is involved in licensing and the regulation of rates and mergers, the entire industry is invested with "state" action, giving us the power and the obligation to prohibit discrimination in all of the regulatees' operations. Although

ATA seeks to limit this prohibition to discrimination in the services performed, EEOC finds no reason so to restrict the meaning of the Constitution and the court decisions interpreting it. It notes that there are numerous cases which hold that involvement of state action requires prohibition of discrimination in both services *and* in internal activities of the private company, citing ***Cone*** and ***Citta, supra***; and ***Smith* v. *Hampton Training School***, 360 F. 2d 577 (4th Cir. 1966). EEOC further argues that even if the necessary state action is not found in the trucking industry's relationship with this Commission, the involvement of this Commission itself is sufficient to mandate ICC action; and that there is no requirement that there be some kind of contract in existence between the Government agency and the private company.

Replying to ATA's assertion that the Federal district courts are available to redress alleged discrimination, EEOC points to the difficulty of securing adequate legal representation and notes (a) that many cases are taken into court without the advantage of an EEOC investigation, (b) that the EEOC presently has no unconditional right to intervene in private actions, and (c) that legal costs and time involved often preclude effective challenges.

4. ***Association of American Railroads.***—AAR states that the arguments in support of Commission jurisdiction in this area are as follows: that authority is to be found in the provisions of the act and in the national transportation policy; that even if specific authority is not found, this Commission must assume jurisdiction under the expanding concept of the "public interest"; and that this Commission has an affirmative constitutional obligation to take jurisdiction over employment practices of carriers. Regarding the question of statutory authority, AAR cites ***St. Louis—S.F. Ry. Co. Discontinuance of Trains, supra***, wherein the Commission found that the cases and statutes cited applied to patrons and to service, but not to employment practices or labor relations. In AAR's opinion, the ***Mitchell, Henderson***, and ***Boynton*** cases, ***supra***, refer to discrimination in service and are not applicable precedent here; and the national transportation policy does not grant specific regulatory authority, but merely is a yardstick for measuring the propriety of Commission action. See the ***Schaffer*** case, ***supra***.

AAR maintains that this Commission cannot assume authority not otherwise specifically granted by statute. While all cases involving "public interest" factors have some bases in statutory authority, it points out that there are no cases in which the Commission has exerted authority over the employment practices of carriers. For example, the question of safety is relative to the issue of fitness (section 207(a) of the act), and the ***Burlington*** case, ***supra***, cited by the proponents of regulation, does not acknowledge Commission jurisdiction over employee relations, but rather relates solely to *service* obligations of carriers. AAR argues also that national policies do not confer jurisdiction. In this regard, the cases cited by proponents base their discussion of national policies on specific statutory authority and no cases are cited in which an agency undertook the enforcement of any national policy which was not directly and immediately related to the statutory powers of the agency itself. The ***Pepco*** case relied upon by EEOC is assertedly inapplicable here because the District of Columbia had a specific statute which directed the Public Utilities Commission to inquire into any violation of laws by any public utility. This Commission allegedly has no such blanket authority.

AAR finally contends that the cases regarding affirmative constitutional obligation on regulatory agencies to assume jurisdiction can only support the theory that discrimination in *services* are prohibited by the Constitution, citing the *Seidenberg*, *Cone*, and ***Irvis*** cases, *supra*; and that the assumption of jurisdiction by the Federal

Communications Commission does not resolve the issues present in this proceeding, inasmuch as the FCC and the ICC were not established by the same law, and the actions of one are not binding on the other.

5. *American Trucking Associations, Inc.*—ATA asserts that no authority has been unearthed to support this Commission's regulation of employment practices of motor carriers. In order to tell the other side of the story about discrimination, respondent offers a statement by its Industrial Relations Department (discussed infra). Regarding the initial statements of the proponents, ATA notes that section 216(d) was derived from section 2(1) of the act, which historically has been interpreted as referring only to service. Further, although the term "public convenience and necessity" includes "public interest" considerations, ATA believes that not all public interest considerations may be included as a substantive requirement for a grant of authority. It is argued that cases cited by the proponents which involve this Commission are inapposite here: many cases cited are of the "service" type. Others involve contracts with the "state," and where such contracts exist, there is admittedly state action sufficient to require the Governmental agency to impose antidiscrimination requirements. No cases have been cited involving a relationship similar to that of this Commission and the carriers. Finally, ATA represents that the promulgation of regulations by the FCC is not valid precedent for the ICC for the reasons that (a) motor carriers while having a high degree of duty as common carriers, do not obtain exclusive use of the highways and cannot be classified as "trustees" holding public property as are FCC licensees; and (b) the 15,000 regulated carriers plainly do not have the monopolistic status of telephone companies.

The statement of ATA's Industrial Regulations Department indicates that ATA has been conducting a comprehensive, industrywide affirmative action program for more than 8 years. Informational services rendered to members include a nationwide conference held in 1966 and each year thereafter; a semimonthly subscription service to carrier industrial relations executives reviewing every espect of the law and the orders since passage of the act; an information kit describing what every truck operator needs to know and do about equal employment opportunity; distribution of 6,000 copies of a pamphlet; a comprehensive minority referral directory furnished by the U.S. Postal Service, distributed to 500 chief executives and industrial relations officers of motor carriers; and the making of speeches by the department's director telling what the law is, what affirmative action is, and urging the personal commitment of the carriers to conform. Besides informational programs, other activities include establishment of a committee to discover ways to remove inhibitions to equal employment in trucking companies, especially in matters of contract seniority, and discussions with the Teamsters and EEOC; a program to promote establishment of top-quality driver training schools; and extensive discussions with the National Alliance of Businessmen to find ways to adopt JOBS money to the peculiarities of placing unskilled or untrained persons in employment. In addition, ATA points out that the statistical information presented in the initial statements indicates a discernible trend of improvement in each of the years in which statistics have been published. Postal Service data show increases in employment of about 1 percent a year for the years 1966, 1968, and 1969. A comparison of 1966 and 1970 data from the EEOC shows an increase in the number of black employees of 1.0 percent to 7.3 percent during those years, and an increase in the number of black operatives of 1.2 percent to 6.9 percent. Signs of improvement were also registered in every classification of employment for which EEOC gathers data. Additional statistics show increases in the number of black road drivers, and, although the actual numbers are small, the data reveal a substantial increase in the percentage of minority employment. While there is admittedly low minority utilization, ATA cannot agree that no effort or progress has been shown.

6. *National Association of Motor Bus Owners.*—NAMBO agrees with other carrier parties that the jurisdiction issue should be decided first. It believes that such jurisdiction is lacking. NAMBO states that, except as noted below, no party has alleged that the intercity bus industry engages in discriminatory employment practices; and that the cases cited do not show rampant discrimination by trucking companies, but rather that adequate judicial and administrative remedies are available. The only reference to a bus company is in the statement of the LDF, citing *Newby* v. *Southern Greyhound Lines*, but NAMBO states that case has been dismissed by the plaintiff, and one of the attorneys representing LDF was counsel for the plaintiff therein; NAMBO, therefore, believes that any reference to the *Newby* case was unethical and improper.

According to NAMBO, there is no existing authority giving this Commission the power to regulate employment practices of carriers. The Civil Rights Act of 1866 confers power to maintain an action, but it allegedly has no bearing on this Commission's jurisdiction. The cases cited by proponents asserting that there is a constitutional obligation to regulate also are not pertinent in NAMBO's opinion. While the holders of Federal licenses may be required under the Constitution to render services on a nondiscriminatory basis, NAMBO believes that their employment practices must be regarded as private conduct which does no violence to the 5th or 14th amendments. It asserts that those sections of the Interstate Commerce Act referring to prejudice and discrimination also deal with service, not employment; that *Colorado Anti-Discrimination Commission* v. *Continental Airlines*, 372 U.S. 714 (1963) is not pertinent here because that case did not decide that a similar statute gave the CAB and the FAA authority to regulate employment practices; and that the cited case instead found that, assuming *arguendo* that such power existed, it did not preempt a Colorado statute forbidding racial discrimination in hiring. NAMBO also notes this Commission's disclaimer of jurisdiction in the *Discontinuance* case, *supra*, and argues that the national transportation policy is not a source of power, but merely sets guidelines for the exercise of statutory authority.

Even assuming that jurisdiction exists, NAMBO believes that it should not be exercised. The expertise that will be required to cope with the problem of discrimination assertedly is not the type possessed by this Commission; and the Congress was then considering pending legislation to expand the power of EEOC, which legislation (a modified version of which was since enacted) it believed should result in the dismissal of the instant proceeding, for the support of the EEOC herein is based, to a considerable extent, on its lack of power.

Furthermore, NAMBO contends that the regulations proposed by certain parties are impractical and unfair; that carriers would be required affirmatively to establish compliance in almost all cases; and that final Commission approval would be withheld in any case in which the issue of discrimination arises. It represents that this procedure would be too protracted and costly, and would affect carriers unevenly. NAMBO believes that the rules suggested by the Department of Justice would not be so unfair or impractical, but neither would they serve to eliminate discriminatory employment practices.

7. *Wheaton Van Lines, Inc.*—Wheaton asserts that the language of the Interstate Commerce Act itself, as well as the decisions of this Commission and the courts

construing that statute, limit our regulation of transportation to services and facilities; that the language of section 216(d), heavily relied upon by proponents, refers only to service, citing the *Discontinuance* case, *supra;* and that where the Congress intended to confer jurisdiction over labor matters, it did so by specific language, in sections 5(2)(c) and (f) of the act. It is contended that the statute itself makes it clear that the jurisdiction of this Commission is limited to regulation of services and facilities [section 202(a)]; and that the language of the national transportation policy does not confer the necessary jurisdiction. Wheaton notes the letter of Chairman Stafford to the U.S. Commission on Civil Rights, dated July 23, 1970, stating his opinion that "neither the Act nor its legislative history provide any indication of a Congressional intent to convey to this Commission any jurisdiction over the employment practices of regulated carriers * * *."

Assuming *arguendo* that jurisdiction exists, Wheaton maintains that such power should not be exercised. In its view, the promotion of equitable employment practices is the primary function of other agencies expressly constituted for that purpose, whereas the primary function of this Commission is the regulation of the services and facilities of carriers; and absent a complete breakdown in the regulation by existing agencies, there is no need for this Commission to enter the field. Second, it represents that another set of regulations would increase the probability of contradictory requirements by the various regulating agencies; that additional requirements would result in duplication of activities for the Government and the carriers; and finally, that regulation of carrier employment practices would impose an impossible and unnecessary burden upon this Commission, especially in view of its serious manpower shortage noted in the 85th Annual Report to the Congress.

APPENDIX II

Rules proposed by certain parties

1. N.A.A.C.P. LEGAL DEFENSE AND EDUCATIONAL FUND, INC.

Section 1. *Statement of Policy.*—A full and fair consideration of all relevant factors having been made, it is hereby determined that employment discrimination by operators of interstate common and contract carriers by motor vehicle against an individual because of his or her race, color, religion, sex, or national origin is contrary to the public interest, convenience, or necessity and constitutes an undue burden on interstate commerce.

Section 2. *Rules Prohibiting Unlawful Employment Practices.*—(a) It shall be unlawful, and is hereby prohibited, for an employer in the operation of common or contract carriers by motor vehicle subject to regulation by the Interstate Commerce Commission—

(1) to fail or refuse to hire or to promote any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origins; or

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(b) It shall be unlawful, and is hereby prohibited, for any employer in the operation of common or contract carriers by motor vehicle subject to regulation by the Interstate Commerce Commission to discriminate against any individual because of his or her race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship, training, or other job-related training or retraining, including any on-the-job training program.

(c) It shall be unlawful, and is hereby prohibited, for any employer in the operation of common or contract carriers by motor vehicle subject to regulation by the Interstate Commerce Commission to discriminate against any individual because he has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing pursuant to these rules.

Section 3. *Enforcement Provisions.*—(a) Whenever it is found that an employer in the operation of common and contract carriers by motor vehicle subject to regulation by the Interstate Commerce Commission is violating any provision of §2, the Commission shall endeavor to eliminate any such unlawful practices by informal methods of conference, conciliation, and persuasion.

(b) If such informal methods fail to resolve said unlawful practices, the Commission shall notify said employer that he has thirty (30) days to request a hearing on said matter and to show cause why his certificate, license, or permit should not be revoked, suspended, modified or amended, or other appropriate action taken to rectify said unlawful discriminatory practices.

(c) Failure to take action as required by §3(b) or a finding by the Commission of discriminatory practices under §2 of these rules as a result of an adjudicatory hearing pursuant to §3(b), shall empower the Commission to revoke, suspend, modify or amend the operating license, certificate or permit of said employer, or to take any other appropriate action against said employer the Commission may deem necessary.

Section 4. *Complaint Procedure.*—(a) Any person, organization, or other entity may file a complaint alleging a violation of any provision of §2 by any employer subject to these rules subject to the provisions hereof, and any such complaint shall automatically be associated with each pending or subsequently filed complaint against said employer.

(b) Any complaint filed by an individual under §3(a) with the Commission shall promptly be transmitted to the Equal Employment Opportunity Commission (EEOC) and all other concerned governmental, State, and local agencies, with a request to treat such complaints as charges filed under Title VII of the Civil Rights Act of 1964 and to coordinate all investigatory efforts with those of the Commission. Complaints filed with the Commission, after consultation with the EEOC, shall be forwarded to the U.S. Department of Justice when it appears that there is or may be a pattern or practice of discrimination in employment in violation of Title VIII of the Civil Rights Act of 1964.

(c) Whenever any concerned governmental, State, or local agency, including but not limited to EEOC, the Post Office Department, and the Office of Federal Contract Compliance, shall determine that reasonable cause exists to believe that a common or contract carrier by motor vehicle subject to regulation by the Interstate Commerce Commission, has violated any part of Title VII of the Civil Rights Act of 1964 or any part of §2 of these rules, it is requested to transmit immediately such determination to the Interstate Commerce Commission. Such determination shall constitute a prima facie finding of a violation of §2 and shall empower the Commission to require an employer so accused to show cause, pursuant to §3(b), why his certificate, license, or permit should not be revoked, suspended, modified, or amended, or other appropriate action taken to rectify said unlawful practices.

(d) Whenever six (6) or more complaints have been filed with the EEOC alleging a violation of Title VII of the Civil Rights Act of 1964 against a common or contract carrier by motor vehicle subject to regulation by the Interstate Commerce Commission, irrespective of any finding of reasonable cause, the EEOC is requested to immediately forward such complaints to the Commission and to coordinate its investigatory efforts with those of the Commission.

(e) Whenever any other concerned governmental, State, or local agency has received six (6) or more complaints alleging a violation of Title VII of the Civil Rights Act of 1964 against a common or contract carrier by motor vehicle subject to regulation by the Interstate Commerce Commission, irrespective of any finding of reasonable cause, it is requested to immediately forward such complaints to the Commission and to coordinate its investigatory efforts with those of the Commission.

(f) Any complaint alleging a violation of §2 of these rules may be filed with the regional office of the Interstate Commerce Commission wherein the individual, organization, or other entity resides or has its principal office.

Section 5. *New Applicants—Rule Requiring a Showing of Nondiscrimination.*—Every applicant for a certificate of public convenience, interest, or necessity; every applicant for a permit to operate as a contract carrier; every applicant for a temporary certificate or permit; every applicant for approval of a consolidation, merger, purchase, lease, or contract to operate; every applicant for extension of service or authority; and every carrier filing a new joint or individual rate, charge, or classification at the time of making such application or filing must affirmatively demonstrate that its operations do not violate the provisions of §2 of these rules. Any carrier which cannot affirmatively demonstrate full compliance with the antidiscrimination provisions shall have such application or filing rejected, or declared unlawful, or both. The Commission shall not take final action to approve or grant any application or filing until all complaints filed pursuant to §4 of these rules against a carrier have been satisfactorily resolved.

Section 6. *Affirmative Action Plan—Indicative of Compliance with §2 and §5.*—An affirmative demonstration of compliance with the antidiscrimination provisions of §2 and §5 of these rules shall include but not be limited to the adoption of an "Affirmative Action Plan" which includes the practices policies set forth below:

(a) To assure nondiscrimination in recruiting:

A. Posting notices in company employment offices and application forms informing applicants of their equal employment rights and right to notify the Interstate Commerce Commission if they believe they have been the victims of discrimination.

B. Placing employment advertisings in media which have a significant circulation among minority group people.

C. Recruiting through schools and colleges with significant minority group enrollments.

D. Making known to all recruitment sources that qualified women and minority members are being sought for consideration whenever the company has positions available.

(b) To assure nondiscrimination in selection and hiring:

A. Adoption of objective, reviewable standards and procedures for hiring and otherwise dispensing job opportunities.

B. Insuring proper consideration of all applicants.

C. Inclusion of effective nondiscrimination clauses in union agreements.

D. Avoiding use of selection techniques or tests which have the effect of discrimination against minority group members.

(c) To assure nondiscriminatory placement and promotion:

A. Instructing personnel staff members that minority employees and women are to be considered without discrimination, and that categories or departments with little or no minority or female representation shall be reviewed.

B. Reviewing seniority practices to insure that such practices are nondiscriminatory and do not have a discriminatory effect.

(d) To eliminate effects of past discriminatory practices, every carrier which maintains separate city and over-the-road seniority driving classifications shall immediately adopt the following practices:

A. No new drivers shall be placed on the over-the-road seniority roster except as hereinafter provided.

B. All minority city drivers shall be given the right to transfer immediately to the over-the-road seniority roster.

C. Upon transfer, a former minority city driver will retain full company seniority for all purposes, including over-the-road runs.

D. Only after each minority city driver has been given the opportunity to transfer to an over-the-road position may a carrier hire a new over-the-road driver from the outside.

Section 7. *Rules—Information Concerning Carrier Practices.*—(a) On or before May 31 of each year, every common and contract carrier by motor vehicle subject to regulation by the Interstate Commerce Commission shall file with the Commission a copy of its current EEO-1 report.

(b) Every common and contract carrier by motor vehicle subject to regulation by the Interstate Commerce Commission shall maintain for a period of 3 years all complaints concerning its employment practices. Such complaints, upon request, shall be furnished to the Commission.

(c) Within six (6) months of the effective date of this rule, every common contract carrier by motor vehicle subject to regulation by the Interstate Commerce Commission shall file with the Commission an "Affirmative Action Plan" which conforms to the requirements of Executive Orders Nos. 11246 and 11375, Order No. 4 of the Office of Federal Contract Compliance, the current testing guidelines of the EEOC and §6 of these rules.

(d) Failure to comply with the provisions of §§7(a), (b), and (c) by any carrier by motor vehicle subject thereto shall empower the Interstate Commerce Commission to review the carrier's license, certificate, or permit. Said review shall result in a determination of whether the carrier's license, certificate, or permit should be suspended pending compliance therewith or whether other appropriate action may be necessary.

Section 8. *Public Information.*—All documents, records, reports, reviews, et cetera, obtained by the Interstate Commerce Commission pursuant to these rules shall at all reasonable times be available for public inspection and copying.

2. EILEEN SCHNEIDER, REUBEN B. ROBERTSON III, AND DAVID BONDERMAN

Section 1. *Rule.*—It is prohibited and contrary to the public convenience and necessity for any interstate common or contract carrier by motor vehicle subject to the provisions of part II of the Interstate Commerce Act to discriminate in employment on the basis of race, color, religion, sex, or national origin.

Section 2. *Information Concerning Carrier Practices.*—(a) On or before May 31 of each year, every interstate common and contract carrier by motor vehicle employing 10 or more persons shall file with the ICC a copy of its current EEO-1 form.

(b) Every carrier shall maintain for a period of 3 years all complaints concerning its employment practices. These complaints, upon request, shall be furnished to the ICC.

(c) Within 6 months of the effective date of this rule, every interstate common and contract carrier by motor vehicle employing 10 or more persons shall file with the ICC an affirmative action plan which conforms to the requirements of Executive Order No. 11246, as amended by Executive Order No. 11375, Order No. 4 of the Office of Federal Contract Compliance, the current testing guidelines of the EEOC, and section 3 of this rule.

Section 3. *Contents of Affirmative Action Plan.*—Each affirmative action plan filed in accordance with section 2 of this rule shall include but not be limited to the adoption of the practices and policies set forth below:

(a) To assure nondiscrimination in recruiting:

A. Posting notices in company employment offices and application forms informing applicants of their equal employment rights and right to notify the Interstate Commerce Commission if they believe they have been the victims of discrimination.

B. Placing employment advertisings in media which have a significant circulation among women and minority group people.

C. Recruiting through schools and colleges with significant female and minority group enrollments.

D. Making known to all recruitment sources that qualified women and minority members are being sought for consideration whenever the company has positions available.

(b) To assure nondiscrimination in selection and hiring:

A. Adoption of objective, reviewable standards, and procedures for hiring and otherwise dispensing job opportunities.

B. Insure proper consideration of all applicants.

C. Inclusion of effective nondiscrimination clauses in union agreements.

D. Avoiding use of selection techniques or tests which have the effect of discrimination against minority group members and women.

(c) To assure nondiscriminatory placement and promotion:

A. Instructing personnel staff members that minority employees and women are to be considered without discrimination, and that categories or departments with little or no minority or female representation should be reviewed.

B. Reviewing seniority practices to insure that such practices are nondiscriminatory and do not have a discriminatory effect.

(d) To eliminate effects of past discriminatory practices, every carrier which maintains city and over-the-road driving classifications shall immediately adopt the following practices:

A. No new drivers shall be placed on the over-the-road seniority roster except as hereinafter provided.

B. All minority city drivers shall be given the right to transfer immediately to the over-the-road seniority roster.

C. Upon transfer, a former minority city driver will retain full company seniority for all purposes, including bidding on over-the-road runs.

D. Only after each minority city driver has been given the opportunity to transfer to an over-the-road position may a carrier hire a new over-the-road driver from the outside.

Section 4. *Obligation of Applicants to Show Nondiscrimination.*—Every applicant for a certificate of public convenience and necessity; every applicant for a permit to operate as a contract carrier; every applicant for a temporary certificate or permit; every applicant for approval of a consolidation, merger, purchase, lease, or contract to operate; every applicant for transfer of a certificate or permit; every applicant for extension of service or authority; and every carrier filing a new joint or individual rate, charge, or classification; at the time of making such application or filing must affirmatively demonstrate compliance with the provisions of this rule. Any carrier which cannot affirmatively demonstrate full compliance with the antidiscrimination provisions shall have such application or filing rejected, or declared unlawful, or both. The Commission shall not take final action to approve or grant any application or filing until all complaints filed pursuant to this rule against the carrier have been satisfactorily resolved.

Section 5. *Complaint Procedures.*—(a) Any person may file a complaint alleging discrimination or violation of any provision of this rule on the part of any employer subject to the provisions hereof, and any such complaint shall automatically be associated with each pending or subsequently filed application or filing by such employer.

(b) The Interstate Commerce Commission shall promptly transmit all complaints filed pursuant to this rule to the EEOC, with a request to treat such complaints as charges filed under Title VII of the Civil Rights Act of 1964, and shall also transmit such complaints to the U.S. Department of Justice when it appears that there is or may be a pattern or practice of discrimination in employment in contravention of Title VII of such act and to the Office of Federal Contract Compliance when the charge involves a Federal Government contractor or subcontractor.

(c) Whenever the EEOC shall determine that reasonable cause exists to believe that a carrier subject to this rule has violated Title VII, and whenever the OFCC shall issue a show cause notice pursuant to 41 CFR 60-1.28, they are requested to transmit that information to the ICC. The ICC shall immediately thereupon cause to be served upon such carrier a notice that reasonable cause exists to believe that said carrier is in violation of this rule, and that should conciliation efforts of the EEOC or OFCC fail, said carrier's certificate, permit, or application will be immediately suspended. Thereafter, within 90 days the ICC shall hold a hearing to determine whether the carrier is in violation of any provision of this rule. The EEOC and/or OFCC shall be invited to present their views and evidence at any hearing held pursuant to this rule. If the ICC, after hearing, determines that the carrier has violated any provision of this rule, it shall revoke the carrier's certificate, permit, and/or application, or take other appropriate action.

(d) Whenever a complaint under this rule which raises a substantial or complex issue of fact or law has been filed against a motor carrier, the ICC shall, pursuant to 49 U.S.C. §305(j), provide sufficient funds to responsible private representatives of the public interest to enable them to present the independent views of the public.

Section 6. *Public Information.*—All documents, records, reports, reviews, et cetera, obtained by the ICC pursuant to this rule shall at all reasonable times be available for public inspection and copying.

3. UNITED STATES COMMISSION ON CIVIL RIGHTS

(a) *Procedures.*

(1) *Complaints.*—As provided in the present ICC rules with respect to other subject matter, any interested party should be empowered to initiate a proceeding by complaint of violation of ICC equal employment opportunity rules.

(2) *Applications.*—Requirements such as the following should be included with respect to applications. (a) On application for initial licenses, or in connection with other major applications, full on-site equal employment opportunity compliance review, and affirmative action plan review, and approval, should be a prerequisite to grant. (b) On other applications, review of current equal employment opportunity data, and affirmative action plan review, and approval, should be a standard component of the proceeding. (c) Applicants should be required to notify interested parties, including civil rights organizations, of their applications. (d) The rules should make clear the right of interested persons to raise the issue of equal employment opportunity compliance and to intervene and participate in application proceedings.

(3) *Periodic Reports.*—Affirmative action plans and specified equal employment opportunity data should be required to be submitted periodically. Such information should be made a matter of public record except to the extent—consistent with ICC requirements—business secret privileges are applicable.

(4) *Periodic ICC Reviews.*—The ICC should conduct (see section (d) below) periodic equal employment opportunity reviews of regulated businesses.

(b) *Substantive Requirements.*—The ICC rules should provide that the substantive requirements set forth in 40 CFR 60 are applicable to all regulated businesses with 50 or more employees. Regulatees with from 5 to 49 employees should be made subject to a "short form" written affirmative action plan requirement which, as specified by rule, states, by major category (*e.g.*, recruitment, upgrading, et cetera), the existence of affirmative action policies and practices of the regulatee.

(c) *Sanctions.*—The consequences of noncompliance with equal employment opportunity rules should include fines, authority suspensions or revocations, and application denials. Approval of applications should be suspended during investigation and resolution of issues raised by substantial evidence of significant violation of equal employment opportunity requirements.

(d) *Coordination with Other Agencies.*—Pursuant to written agreement between the ICC, on the one hand, and (individually or in combination), the OFCC, the compliance agency or agencies with primary responsibility for enforcement of Executive Order No. 11246 with respect to ICC regulatees, and the Equal Employment Opportunity Commission, the ICC should establish working interagency relationships along the following lines.

(1) *Information Requests.*—Standard procedure in application proceedings before the ICC should be to request pertinent equal employment opportunity information from other concerned agencies.

(2) *Notification of Action.*—Other agencies should notify the ICC of all actions, including the initiation of investigations or enforcement proceedings, relating to the equal employment opportunity practices of regulatees.

(3) *Agency Participation.*—Where equal employment opportunity on the part of the regulatee becomes an issue in an ICC proceeding, one or more of the other agencies should participate, for example by conducting, and reporting the results of, a complaint investigation, compliance review, or affirmative action plan analysis. The ICC should allow reasonable time for such investigations, reviews, and reports. Provision for standard referral arrangements, such as referral of complaints for processing, should be included.

(4) *Technical Assistance and Shared Staff Use.*—In complaint investigations, compliance reviews, and the like, pooling of staffs should be provided for. Technical assistance also should be provided. ICC rules should be amended wherever necessary to permit such cooperative arrangements. For example, it should be provided (see 49 CFR 1020.1) that representatives of other agencies may be authorized to examine records of regulatees.

4. OFFICE OF FEDERAL CONTRACT COMPLIANCE, DEPARTMENT OF LABOR

While detailed suggestions for such rules were not proffered in this initial statement, we believe it timely to set forth here a few basic points which, in OFCC's view, are necessary to any equal employment opportunity rules.

(1) A general prohibition of discrimination on account of race, color, religion, sex, or national origin, including a requirement of remedial relief for members of any "affected class" who, by virtue of past discrimination, continue to suffer present discriminatory effects.

(2) A requirement for the establishment of affirmative action programs which conform to the provisions of Executive Order No. 11246, as amended, and Order No. 4 of the OFCC, 41 CFR part 60-2.

(3) A requirement for the filing of appropriate employment information and an affirmative action program.

(4) Appropriate sanctions for violators of the equal employment opportunity regulations, including fines, authority suspensions or revocations, and application denials.

(5) Provisions for the cooperation with, and referral of complaints to and from, as appropriate, other Federal agencies including the OFCC, EEOC, Justice Department, and the U.S. Commission on Civil Rights. As standard procedure in all application proceedings, the ICC should request information from other concerned agencies as to the equal opportunity status of the regulatee under investigation. And, when the OFCC, EEOC, or Justice Department takes official action with regard to a regulated carrier, such as the issuance of a Notice of Intent to Debar and/or actual debarment by the OFCC, a determination of reasonable cause by the EEOC, or the filing of a civil action under Title VII by the Justice Department, such agencies should be required to notify ICC of their action with the reasons therefor, in order that ICC may take appropriate action.

(6) A mechanism whereby review of the equal employment opportunity status of a carrier occurs on each occasion the carrier applies for any type of license, authorization or exemption, on each occasion where a complaint against the carrier's employment practices violative of these rules is received either directly by the ICC or indirectly by referral from any other agency, and on such additional occasions as the ICC itself deems appropriate.

APPENDIX III

Excerpts from a statement on behalf of the Interstate Commerce Commission, delivered by Vice Chairman O'Neal before Congressman Parren Mitchell's hearings on Minority Owned Carriers in the Trucking Industry—December 4, 1975.

I am pleased to appear before you today on behalf of the Interstate Commerce Commission to discuss the role of the minority-owned carrier in today's regulated trucking industry.

While we recognize that any denial of the existence of discrimination will be accepted with skepticism in some quarters, we firmly believe that there is no discrimination inherent in the regulatory process as such or in the decisions on the Interstate Commerce Commission. The principal source of any question concerning discriminatory regulation relates to the licensing of motor carriers. This statement, therefore, deals chiefly with motor carrier licensing.

At the outset I wish to emphasize that it is necessary for an applicant to have the financial means to conduct the operations proposed and, depending upon the intended scope of operations, this could require significant financial backing. This in effect merely recognizes a fact of life which, however, is important to those who rely upon the carrier for service. In addition, shipper support for a proposed service is needed for a successful application and this would at times necessitate the minority applicant seeking such support outside his or her own community. To the extent these needs may place burdens that bear more heavily on minority members than other members of society, however, they are the end result of conditions in society rather than the inherent character of the licensing system. Moreover, there is the related question of whether the requirement that a prospective carrier obtain a license in fact discriminates against minority group members who for reasons wholly unrelated to regulation were unable to acquire the necessary authority at some time in the past. In 1935 some individuals engaged in the trucking business were able, after passage of the Motor Carrier Act that year (incorporated in the Interstate Commerce Act), to receive "grandfather" certificates without proving a public need for their service. Many of these so-called "grandfather" operators were small companies and individuals. Some "grandfather" operators were members of minority groups or companies owned by minority members. But just as there were fewer minority banks, retail stores, and insurance companies in 1935 than might be expected based upon their proportion to the general population, there were undoubtedly disproportionately fewer minority truckers. This economic situation resulting from historic inequities probably existed, although we doubt that its elements can be quantified. I will return to this later in this statement.

Our conclusion is that there is nothing the regulatory structure itself or the Interstate Commerce Commission's execution of its regulatory function that discriminates against minority interests. Let me explain how motor carrier licensing works.

The Interstate Commerce Act requires that a certificate now be issued upon a showing of public convenience and necessity. Such a showing is made by the testimony of shippers or users who support an application. Through their support they indicate a need for the services specifically sought. The statute does not allow for the granting of authority based upon the mere desire to enter the trucking business or having appropriate insurance, a bond, a good character. There is a service-need test to assure that grants of authority are made on a reasonable and rational basis to avoid the establishment of redundant and wasteful transportation facilities and thus assure a reliable and stable transportation service.

A large percentage of the licensing cases we decide result in a grant of some authority. In these licensing cases, the major requirement is that the applicant demonstrate that his proposal is responsive to a public demand left unsatisfied by existing carriers. As just indicated, this is generally accomplished by testimony of prospective shippers who intend to use the proposed service, establishing specific facts which meet this burden of proof. The shipper is required to indicate the type of freight that will be moving, the volume which he will tender to the applicant, and the points and places from and to, or between which, the freight will move in order to enable this Commission to frame a grant of authority appropriate to the needs of the shipping public. Moreover, an existing carrier holding authority has the right to challenge an application.

The great majority of our licensing cases are handled by the submission of sworn verified statements by the parties. We call this the modified procedure. Under the modified procedure the submission of written statements constitutes the hearing in the case and no oral testimony or cross-examination is permitted in most instances. Nowhere in the application form *** or in the issues that must be discussed in the sworn statements is information sought that would reveal the race, religion, ethnic background, or sex of the parties involved. Thus, in modified procedure cases, unless the parties voluntarily bring the matter to our attention, there is no way in which the Commission can possibly know that a carrier is affiliated with members of any particular minority.

While the same situation may not exist at the hearing level in those cases that are subject to an oral hearing inasmuch as the Administrative Law Judge may be in a position rightly or wrongly to draw conclusions as to the minority status of applicant and shippers, those hearing officers have been qualified on the basis of strict standards by the Civil Service Commission in a written and oral examination program that emphasizes the need for objectivity and freedom from bias. Their participation in the proceedings should further rather than detract from our meeting the requirement of law that regulation under the Interstate Commerce Act be evenhanded.

The next question that may be asked is whether the licensing process itself is so costly to an applicant carrier that minority group members, who in many instances may be less well off financially, are not able to afford to make the initial investment. We do not believe so. Our application fee of $350 is based on a requirement of the Independent Offices Appropriations Act of 1952 (31 U.S.C. 483a) and is considered small in relation to the investment necessary to commence a successful carrier undertaking. Basically, that act requires the Commission and other agencies to prescribe by regulation such fees as it shall determine "to be fair and equitable, taking into consideration direct and indirect cost to the Government, value to the recipient, and public policy or interest served, and other pertinent facts." A certificate or permit to operate as a motor carrier is a property right and of value to its holder. The $350 filing fee does not, in some instances, cover the Commission's full cost of handling the application. Moreover, one of the requirements that every applicant must meet is that he or she is fit, financially and otherwise, to perform the service proposed. While the requirement of financial reliability is not generally considered to be a severe one, it would appear that applicants unable to pay $350 as a filing fee would have extreme difficulty establishing their financial fitness and also would not likely be in a position to undertake a successful motor carrier operation.

Another problem regarding costs and finances involves lawyers' fees. Many individuals wish to employ lawyers because they feel that the evidentiary requirements are technical and that a lawyer has some special ability to help their cases. Certainly in many cases the availability of a lawyer may help the presentation of an individual's case, but the lawyer's presence is definitely not essential. Our licensing applications are issued with accompanying instructions designed to assist applicants. When an application is designated for processing under the modified procedure, the Commission sends to the applicant a complete explanation describing in detail the type of evidence necessary for the applicant to make his case. This information is designed for the use of individual applicants who are not attorneys. Furthermore, the Commission's 79 field offices are all staffed with personnel trained to assist in the filing of applications and in the submission of verified supporting statements. The parties are invited to call upon the Commission's field offices for whatever assistance they require for the preparation of their applications and pleadings. The Commission's staff does not prosecute the case for them, nor does it act as legal counsel, but it does offer and often provides the guidance necessary to help a carrier make its case before us.

With regard to the question of whether there is a bias in the licensing process, therefore, we can state without hesitation that the existing regulatory system does not itself discriminate against minority group members.

Returning again to the question of overcoming historic inequities, we think it important to take note of the fact that it is not an easy thing for a financially strapped person, whether or not a member of a minority group, to get started in any business. Nevertheless, trucking is certainly among the most attractive to persons who do not have a great deal of capital at their disposal. With a relatively small down payment, an individual with limited funds can get a start in the trucking business.

Typically, many of such individuals do not haul freight on their own in the beginning; instead they work as owner-operators for a licensed carrier, gaining experience in the transportation industry. An owner-operator is one who owns his own vehicle (usually just one) and enters into contractual or lease agreements whereby he agrees to haul commodities for an established carrier and is paid on a trip basis. Following an extensive investigation into ways to aid independent owner-operators who lease their vehicles to the regulated motor carrier industry, the Commission recently decided to require the carriers to furnish owner-operators with copies of the freight bill whenever the lease is based on a division or percentage of revenue to be received.

The reason for imposing this requirement is to eliminate the practice of "skimming" by certain carriers and to place owner-operators in a more equitable bargaining position. Skimming is the practice whereby a carrier improperly reduces compensation actually due the owner-operator under a division of revenues by misstating the weight of a given shipment, the rate applicable, or the revenue for the transportation service provided.

When the owner-operators have gained some experience and have perceived of a transportation need that is not met by the existing industry, many begin to file new applications with us. There are many responsibilities that go with owning a vehicle and operating pursuant to a certificate issued by this Commission. However, it should be clear that getting a truck and a license to haul freight in interstate commerce remains a more realizable business possibility for any person who is knowledgeable, responsible, and able to fill an unmet need for transportation than entry into many other areas of business. Greater assistance to such a person appears to us to be a lawful Government objective.

We continue to believe that the trucking field is a fertile one for small and minority-owned businesses which do not have a great deal of capital at their disposal. At a relatively small initial cost, individuals without great resources can set themselves up in the trucking business.

The Commission does not possess any statistics concerning the number of motor carrier certificates and permits that are owned by minority group members. Nor have we been able to determine any sources for such information. This type of data is not sought by the Commission in any of the documents that a carrier must file with us, and to our knowledge is not collected and compiled by any agency of Government.

No. 35975

ALLIED CHEMICAL CORPORATION v. BURLINGTON NORTHERN INC.

Decided February 14, 1977

Upon further reconsideration, findings in the prior report reversed in part. Demurrage, collected for the detention of private cars on private tracks during February 1973 and resulting from the failure of the private car owner to comply with tariff requirement to avoid such charges, found applicable and not shown to be unjust or unreasonable. Proceeding discontinued.

John G. Wentz for complainant.
William R. Power for defendant.
Thomas C. Dorsey for intervener.

REPORT AND ORDER OF THE COMMISSION ON FURTHER RECONSIDERATION

BY THE COMMISSION

In the prior report (351 I.C.C. 748) we found consideration of the reasonableness of demurrange charges collected by defendant Burlington Northern, Inc. (BN) from Allied Chemical Corporation (Allied) for shipments during June and July 1971 barred by the statute of limitations, Section 16(3)(B). We further found that for shipments during February 1973, the collection of demurrage by the railroad on private cars on private tracks was unjust and unreasonable. We concluded that despite the failure of the shipper-owner to either to stencil properly its private cars with the consignee's name as the lessee thereof or, alternatively to place placards with similar information on the cars *and* note on the bills of lading that the cars are leased to the consignee (action required by the tariff to avoid the demurrage charges), the applicable demurrage charges were unjust and unreasonable.

The Commission's decision was based on the following considerations: (1) private cars on private tracks were involved, (2) the power to insure that the private cars and bills of lading are marked properly is not within the consignee-lessee's control, and (3) there existed a contract provision between the shipper-lessor and consignee-lessee providing for payment by the consignee of demurrage charges directly to the shipper when the private cars are detained beyond the free-time period specified in the contract. Reparations were ordered.

Defendant and the Association of American Railroads (AAR or intervener)[1] both filed on May 7, 1976, petitions for reconsideration of the prior decision. Upon consideration of the matters raised in these petitions and the reply thereto filed by complainant on May 24, 1976, we reopened this proceeding by order entered October 21, 1976 for further reconsideration on the present record.

The basic and controlling facts were accurately set forth in detail by the Administrative Law Judge and restated in the prior report to the extent necessary for proper understanding of the issues, and we shall not restate them here.

DISCUSSION AND CONCLUSIONS

As noted, the demurrage charges were assessed and collected by defendant pursuant to a lawfully published tariff against a consignee-lessee on privately owned cars on privately owned tracks, and on cars also subject by private contract for payments to the owner when detained beyond specified times. The involved tariff would have exempted the consignee from paying the otherwise applicable demurrage charges on such private cars when trip leased to the consignee provided that the private cars either (1) were stenciled with the consignee's name as the lessee thereof, or, alternatively (2) bore placards with similar information and had a notation to the same effect on the bill of lading. Neither notification requirement was met. The demurrage charges therefore are clearly applicable. The question is whether under such circumstances they are just and reasonable.

In addressing this issue, we note that equitable considerations seemingly would militate against allowing the carrier to benefit from demurrage charges where neither carrier equipment nor tracks was involved. Further, since the detention payments specified in the private contract provide an incentive for the return of the cars, to use the additional payment of charges set forth in the carrier's tariff would seem unnecessary. But to the extent the private detention charges are less than the otherwise applicable carrier charges, they are an inadequate substitute. Here the charges[2] are substantially less, and under the circumstances we do not find them to be unjust and unreasonable, even though private cars, private tracks, and private detention charges also are involved.

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[1] AAR's petition for reconsideration accompanied a petition for leave to intervene, which was also granted by our order of October 21, 1976.

Even if the private detention charges in issue were identical to the carrier's, additional considerations would nevertheless lead us to conclude that the retention of the demurrage charges assessed against the consignee in issue by the carrier here is not unjust or unreasonable. These are (1) the need of carriers for a reasonable opportunity to comply with statutory requirements to enforce their tariffs and (2) the fact that the tariff involved provided a simple mechanism whereby the charges could have been avoided.

Numerous judicial decisions[3] have noted that the act is intended to secure uniformity of treatment to all, suppress unjust discrimination and undue preference, and prevent special and secret agreements with respect to rates for interstate transportation. To that end of the act requires that rates be: (a) established in a manner calculated to give them publicity, (b) inflexible while in force, and (c) unalterable save in the mode prescribed. Tariffs play a central role in ensuring uniform and equal treatment to all and are accorded the force and effect of a statute. For this reason the courts have consistently prohibited contracts between shippers and carriers which contravene tariffs. A legally promulgated tariff is binding on both carrier and shipper, and its terms, in essence, become the only contract allowed by law between them respecting conditions, services, and price therefor. ***Union Pacific Railroad Company*** v. ***Higgins***, 223 F. Supp. 396, 401 (1963). Deviation from rates or charges fixed by schedules duly filed is rarely permitted and the balance of equities between the parties is not considered, as a general rule, to be adequate justification for failure to comply with the tariff. ***Baldwin*** v. ***Milling Co.***, 307 U.S. 478 (1939). In the few situations where the Commission has waived the requirement of strict compliance with the published tariff, circumstances beyond the shippers' control were involved—in almost all cases acts of God.

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[2] The substitute demurrage charge accords seven days free time and is $8 per day thereafter. Under the carrier's tariff (B.B. Maurer's Tariff 4-1) 48 hours of free time is involved and charges thereafter are $10 per day for the first four days, $20 for the next two, and $30 per day thereafter.

[3] ***New Haven R. R.*** v. ***Interstate Commerce Commission***, 200 U.S. 361 (1906), ***Armour Packing Co.*** v. ***United States***, 209 U.S. 56 (1908), ***Kansas City So. Ry.*** v. ***Albers Comm. Co.***, 223 U.S. 573 (1912).

Carriers are required by statute to enforce and collect all charges published in their tariffs not for their benefit but, for the protection of the public for discrimination. *Button* v. *Atchison, T. & S. F. Ry. Co.*, 1 F. 2d 709 (1924) (writ of error dismissed, 270 U.S. 670 (1925)).

Excusing a consignee detaining a car from demurrage charges otherwise applicable because of a private contract to which the carrier is not a party and has no notice of would place the carrier in a difficult situation. The carrier would be required to enforce the terms of the tariff strictly while, a contract between shippers of which the carrier has no knowledge might remove the basis for assessing the charges. To remove such uncertainty where a private contract might nullify the carrier's justification for assessing the charges, we find it clearly appropriate for the carrier to require suitable notation as a prerequisite for avoiding otherwise applicable charges. Since the notification requirement itself was reasonable under the circumstances and since the required notation was not made, the carrier was required to collect the charges and is entitled to keep them as an assurance of future compliance and also as compensation for any costs associated therewith.

We find, that demurrage charges collected by defendant at La Platte, Nebr., for the detention of private tank cars on private trackage during the months of June and July 1971, and February 1973, were applicable; that consideration of the alleged unreasonableness of demurrage charges for shipments during June and July 1971 is barred by the applicable statute of limitations, section 16(b)(3); that for the February 1973 shipments, the application of demurrage charges is not shown to have been unreasonable, unjust, or otherwise unlawful; and that the complaint should be dismissed.

COMMISSIONER BROWN, dissenting:

For the reasons stated in the prior Commission report in this proceeding at 351 I.C.C. 748 (1976), I cannot agree with the majority herein.

I fail to understand the reasoning in the majority report to the effect that:

> ***with regard to ensuring the prompt release of equipment, it is obvious that to the extent the private detention charges are less than the otherwise applicable carrier charges, they are an inadequate substitute. Here the charges [footnote omitted] are substantially less. Accordingly, because the rail demurrage charges in issue were still

> necessary to foster the prompt release of the equipment, there is an adequate basis for finding them just and reasonable, even though private cars, private tracks, and private detention charges are also involved. * * *

The amount of the demurrage charges collected on private as opposed to rail-owned cars is an irrelevant consideration here, it seems to me, where the issue is whether a penalty should be collected *at all* by a railroad in instances where it has no interest in either the car or the tracks.

At the very least, the present inequities in situations such as we are considering here could be remedied by revising the wording of the present exemption to provide that if the consignee-lessee can supply written proof of the existence of a valid lease, then the shipper-lessor will be liable to the railroad for the payment of the demurrage charges. This would certainly be a more equitable result, since by contract the lessee would still remain liable to the lessor for detention charges.

It is ordered, That the prior order awarding reparation be, and it is hereby vacated.

It is further ordered, That the complaint be, and it is hereby, dismissed and that this proceeding be, and it is hereby, discontinued.

No. 36069

CAMPBELL SOUP COMPANY—PETITION FOR DECLARATORY ORDER

Decided February 11, 1977

Upon reconsideration of petition for declaratory order, assailed class rates on truckload shipments of frozen foodstuffs from Salisbury, Md., to points in Middle Atlantic and New England territories found applicable but unjust and unreasonable. Reasonable rates determined and proceeding discontinued.

Henry J. Tyler and *Chester A. Zyblut* for petitioner.

John Guandolo, Philip L. Lipman, and *Richard A. Mehley* for replicant.

REPORT AND ORDER OF THE COMMISSION ON RECONSIDERATION

DIVISION 2, ACTING AS AN APPELLATE DIVISION. COMMISSIONERS HARDIN, O'NEAL AND CHRISTIAN

BY APPELLATE DIVISION 2:

The modified procedure was followed. A petition for leave to introduce additional evidence and for reconsideration of the Report and Order of Review Board Number 4 decided April 23, 1976 was filed by Campbell Soup Company (Campbell or petitioner). National Freight, Inc. (National or replicant) replied. The petition is hereby denied insofar as it requests leave to introduce additional evidence and granted insofar as it requests reconsideration on the present record.

Our conclusions and ultimate findings differ in part from those of Review Board No. 4. However, the board's statement of facts is correct in all material respects, and is adopted as our own. The facts will be restated to the extent necessary for discussion.

This proceeding arises out of an action pending in the Superior Court of New Jersey, Law Division-Cumberland County, in which National seeks alleged undercharges of $37,674.77 for transporting the considered shipments of Campbell's frozen foodstuffs. On October 3, 1974 Campbell filed a formal petition for a declaratory order pursuant to an order of that court referring the following questions to this commission for determination:

1. What are the applicable rates on the frozen foodstuff shipments in issue in the complaint proceeding?

2. If the applicable rates are those claimed by complainant, National Freight, Inc.,

(a) are such rates unjust and unreasonable in violation of section 216 of the Interstate Commerce Act under the circumstances involved in this case;

(b) what should be the lawful level of rates to be collected on the frozen foodstuff shipments involved in the complaint proceedings?

National transported the involved shipments of frozen foodstuffs from petitioner's Salisbury, Md., plant to various Middle Atlantic and New England points between February 20, 1973 and November 23, 1973. For a number of years prior to this period substantial traffic from Campbell's plant had moved via National under commodity rates[1] published in the Middle Atlantic Conference (MAC) tariff S-264-F, MF-I.C.C. No. A-2393, items 10880-10902, in which National was a participating carrier. These rates included loading and unloading by the carrier. National subsequently ended its participation in the MAC tariff and published increased point-to-point commodity rates[2] on frozen foodstuffs from Salisbury, effective February 20, 1973. The new tariff contained an "L" notation which bore the explanation: "Rates are applicable only when shipper loads carrier's vehicle." The "L" symbol appeared in subsequent reissues. It was canceled, effective November 24, 1973. The charges at issue in this proceeding involve shipments from Salisbury during the time the "L" symbol was in effect, all of which were loaded by National. Despite its having performed the loading, replicant billed Campbell in accordance with the commodity rates then in effect. At a later date National rebilled Campbell for undercharges in the amount of $37,674.77, based on application of the higher class rates,[3] which included carrier loading and unloading.

Petitioner takes the position that it was unaware of the presence and significance of the "L" symbol. It submits that the loading symbol was published unintentionally in the tariff, and that the error was immediately corrected through replicant's cancellation of the symbol following a discussion with the carrier's representative in October 1973. The testimony of Campbell's witness attributes to National's representative statements indicating that the latter had been unaware of the existence of the "L" symbol and that National had not intended to publish commodity rates requiring Campbell to load. Campbell maintains it was never requested to load National's trailers during the period the symbol was in effect. Under no circumstances could Campbell have availed itself of the commodity rate, since the company is not equipped to provide loading or unloading service.

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[1] Rates and charges are stated in cents per 100 pounds, unless otherwise indicated.

[2] The commodity rates were published in items 3685 and 3690 of National's tariff MF-I.C.C. No 75, which appeared on original pages 37-B and 37-C from February 20, 1973, through April 22, 1973, 2d revised pages 37-B and 37-C from April 23, 1973 through November 16, 1973, and 4th revised pages 37-B and 37-C from November 17, 1973 through November 23, 1973.

[3] The class rates were published in the Middle Atlantic Conference (MAC) tariff 500, MF-I.C.C. No. A2380 (to points in Middle Atlantic territory), and tariff 501, MF-I.C.C. No. A-2411 (to points in Northeastern territory).

Campbell asserts that the class rates are unreasonable in comparison with commodity rates published by National's competitors. In this regard it states that prior to February 20, 1973, National as a participating carrier in MAC collected a 102-cent rate on a shipment from Salisbury to Albany, N.Y., which was the same rate maintained by Erdner Bros., Inc., a competing carrier. Subsequent to February 20, 1973, MAC published a 105-cent rate to Albany, whereas Erdner maintained a 102-cent rate to the same point. These rates included carrier responsibility for loading and unloading. Effective February 20, 1973, National published a 107-cent rate to Albany with the "L" symbol requiring the shipper to load. Campbell points out that National's rate was comparable to those of its competitors but for the unintentional publication of the "L" symbol. It maintains that the commodity rate relationships following National's cancellation of the symbol, effective November 24, 1973, further support the claim of error and demonstrate that the application of class rates to this traffic would be unjust and unreasonable. On traffic to Albany, MAC maintained a 111-cent rate. National published a 110-cent rate and Erdner maintained a 105-cent rate, each including carrier responsibility for loading and unloading.[4] Campbell argues that the assailed class rates, which are said to be approximately 24.5 percent higher on the average than the commodity rates, have never moved this traffic, and are. in effect paper rates. Had Campbell been aware that National was to assess class rates, it would have moved the involved traffic by competitors at lower commodity rates which provided carrier loading. The evidence submitted by Campbell as to the volume of movement from Salisbury consists of its witness statement that Campbell ships an average of 25 truckloads of frozen foods per day and that prior to February 20, 1973, National was one of three carriers primarily utilized.

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[4] For additional comparisons of National's rates with MAC published rates see Appendix A, and for additional comparisons of National's rates with Erdner Bros.' rates see Appendix B hereto.

Review Board No. 4, reaching the same result as the Administrative Law Judge in the initial decision, found that the assailed class rates were applicable and had not been shown by the evidence of record to be unjust, unreasonable, or otherwise unlawful. The board's majority based its conclusion on the inadequacy of Campbell's rate comparisons, Campbell's failure to provide information on the amount or volume of issue traffic tendered to National or competing carriers, and the insufficiency of evidence supporting the claim of unintentional publication.

In its petition for reconsideration Campbell assigns as error (1) the board's failure to credit Campbell's uncontradicted evidence that the inclusion of the "L" symbol in the tariff was inadvertent and to accord substantial weight to National's deletion of the symbol; (2) the board's conclusion that Campbell's evidence did not permit a rational comparison of the assailed class rates with commodity rates; and (3) its failure to consider Campbell's evidence of traffic volume.

DISCUSSION AND CONCLUSIONS

The issue on reconsideration is whether petitioner has shown the applied class rates to be unjust and unreasonable. Review Board No. 4 correctly found that the class rates were the applicable rates. No error was claimed as to that finding in the petition for reconsideration.

The evidence presented by Campbell is uncontroverted by National.[5] National argues that Campbell has not met its burden of proof in view of the latter's failure to submit specific evidence regarding the level of assailed class rates. This is essentially the position taken by the board. We do not agree. Taken as a whole, the evidence submitted by petitioner establishes that the class rates were unjust and unreasonable to the extent they exceeded the commodity rates which would have applied had Campbell performed the loading.

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[5] In its statement, replicant National not only fails to set forth any facts and arguments contradictory to those of petitioner Campbell but concedes the following:

> Respondent National Freight Company has carefully reviewed and analyzed the Campbell Soup Statement and is of the opinion that that verified statement provides the Commission with all of the facts involved in this proceeding and that there is nothing that it could add to the record.***

Petitioner's presentation is designed to show that the sought commodity rates represent the going level of rates within the territory and therefore that the higher class rates would not move the traffic which Campbell tenders in substantial volume. Campbell's exhibits set forth National's commodity rates from Salisbury to a number of Middle Atlantic and New England points prior to, subsequent to, and during the effective period of the "L" symbol which conditioned application of the rates on loading by the shipper. The levels of National's rates for each time period are shown to closely parallel those of the members of the Middle Atlantic Conference and of Erdner Bros., Inc., which published individual tariffs. The compared commodity rates uniformly include carrier responsibility for loading and unloading with the exception of National's rates during the period of "L" reference. Campbell's traffic historically moved under commodity rates unrestricted by a shipper loading requirement.

National's deletion of the "L" symbol from the rate item following the parties' awareness of its significance is additional evidence that the commodity rates reflect the prevailing level of rates within the territory. This conduct clearly warrants the inference that neither the rates as previously conditioned nor the significatnly higher class rates would continue to move traffic once the shipper discovered the notation. While the subsequent establishment of a lower rate creates no presumption of former unreasonableness, it is entitled to consideration along with other evidence of record. *Universal-Rundle Corp.* v. *Texas & N.O.R. Co.*, 319 I.C.C. 458, 461 (1963); *United States* v. *Atchison, T. & S. F. Ry. Co.*, 315 I.C.C. 259, 263 (1961). The evidence strongly suggests that the assailed class rates applied only by reason of an error in tariff publication. The testimony of petitioner's witness that he was so informed by a responsible representative of the carrier was received without objection and was not rebutted by National. The carrier's subsequent conduct in continuing to load the traffic after the increased, restricted commodity rate became effective, and in deleting the "L" symbol from its tariff corroborates Campbell's contention that inclusion of the tariff symbol was unintentional.

One consideration in determining the reasonableness of a class rate is whether an article moves in sufficient volume within a distribution territory to entitle it to a commodity rates. See *Armstrong Tire & Rubber Company* v. *Illinois Central R. Co.*, 286 I.C.C. 573, 574 (1952). Petitioner's statement indicates that for years it had moved substantial traffic via National under unrestricted commodity rates. Furthermore, the amount of the undercharges sought demonstrates that the subject traffic moved in considerable volume. Campbell has established that commodity rates at the prevailing level include carrier responsibility for loading and unloading.

The foregoing evidence submitted by petitioner amounts to a prima facie case. In view of the fact that replicant has not presented any evidence in rebuttal, the record is convincing that the applicable class rates were unjust and unreasonable to the extent claimed by petitioner.

We find that the assailed class rates were applicable but shown to be unjust and unreasonable to the extent they exceeded the commodity rates which would have applied had petitioner performed the loading on the considered shipments.

We further find that this decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

It is ordered, That this proceeding be, and it is hereby, discontinued.

APPENDIX A

Comparison of rates maintained by National Freight, Inc., prior and subsequent to cancellation of "L" reference

ALL RATES IN CENTS PER 100 POUNDS

From Salisbury, Md., to	Rates maintained prior to Feb. 20, 1973 minimum weight 30,000 pounds	Rates published[3] effective Feb. 20, 1973 minimum weight 30,000 pounds	Rates published[4] effective Nov. 17, 1973 minimum weight 30,000 pounds	MAC rates maintained during period of "L" reference	
Albany, N.Y.	102	107	110	[5]105	[6]111
Baltimore, Md.	59	79	79	62	67
Buffalo, N.Y.	110	125	129	113	119
Exmore, Va.	51	69	71	54	59
Pittsburgh, Pa.	111	117	121	114	121
Souderton, Pa.	75	79	81	78	83
Washington, D.C.	74	86	89	77	82
York, Pa.	76	80	82	79	84
Boston, Mass.	110	117	121	113	119
Milton, Mass.	112	120	124	115	122
New Haven, Conn.	94	101	104	97	103
Newport, R.I.	112	121	125	115	122

[1] Rates are applicable when shipper loads. Original page 72 of MF-I.C.C. 75 effective January 4, 1971.

[2] Middle Atlantic Conference, Agent-Tariff S264-F, MF-I.C.C. A-2393—items 10880 to 10902. Rates include carrier load and unload. National participated in tariff.

[3] Original pages 37-B and 37-C National Freight, Inc., Tariff MF-I.C.C. No. 75. Rates do not include carrier load.

[4] Increased rates published effective November 17, 1973 subject to "L" reference. 4th revised pages 37-B and 37-C, MF-I.C.C. No. 75. Fifth revised pages 37-B and 37-C issued upon 8 days notice; form of publication authorized. I.C.C. Permission No. 72-1100-M canceling "L" reference effective November 24, 1973.

[5] Supp. 2 to Tariff S264-F, MAC, Agent, MF-ICC A-2393. Rates include carrier load and unload.

[6] Supp. 10 to Tariff S264-F, MAC, Agent, MF-ICC A-2393. Rates include carrier load and unload.

APPENDIX B

Comparison National v. Erdner rates

FROM SALISBURY, MD.

To	Prior to Feb. 20		Effective Feb. 20		Effective Nov. 17	
	National	Erdner	National	Erdner	National	Erdner
Albany, N.Y.	102	102	107	102	110	105
Baltimore, Md.	59	64	79	64	79	67
Buffalo, N.Y.	110	119	125	119	129	123
Exmore, Va.	51	51	69	51	71	54
Pittsburgh, Pa.	111	111	117	111	121	114
Washington, D.C.	74	80	86	80	89	83
Souderton, Pa.	75	75	79	75	81	78
York, Pa.	76	76	80	76	82	79

No. 36073

CHRYSLER DE MEXICO, S.A. v. PENN CENTRAL TRANSPORTATION COMPANY

(RICHARD C. BOND, ROBERT W. BLANCHETTE, AND JOHN H. MCARTHUR, TRUSTEES) et al.

Decided March 11, 1977

Rates and charges collected on export shipments of automobile parts from Detroit, Mich., to Laredo, Tex., for forwarding to Mexico, found not shown to be inapplicable or otherwise unlawful. Motion to strike intervener's exceptions denied. Reparations denied and complaint dismissed.

Howell W. Adams for complainant.

William R. Keele for intervener on behalf of complainant.

Richard H. Stahlheber and *David A. McCormick* for defendants.

REPORT AND ORDER OF THE COMMISSION

DIVISION 2, COMMISSIONERS HARDIN, O'NEAL, AND CHRISTIAN

BY THE DIVISION

The modified procedure was followed. Exceptions to the Administrative Law Judge's initial decision were filed by the intervener on behalf of complainant, Southern Shippers Association, Inc. (SSA), to which defendants, Penn Central Transportation Company, Missouri Pacific Railroad Company, St. Louis-San Francisco Railway Company, Southern Pacific Transportation Company, The Texas and Pacific Railway Company, and The Texas Mexican Railway Company, replied. Our conclusions differ from those recommended. Exceptions and requested findings not discussed in this report nor reflected in our findings or conclusions have been considered and found not justified or their resolution unnecessary for the proper disposition of the issues.

By complaint filed October 2, 1974, complainant, Chrysler de Mexico, S.A. (CM), a corporation organized under the laws of Mexico and having its principal place of business in Mexico, Distrito Federal, Mexico, where it assembles automobiles for sale in Mexico, alleged that the rates charged by the defendant railroads on shipments of automobile parts from Detroit, Mich., to Laredo, Tex., for export to Mexico, during the period from December 17, 1970, to December 17, 1973, were inapplicable in violation of section 6(7) of the Interstate Commerce Act, were unjust and unreasonable, and were in excess of the aggregate-of-intermediates in violation of section 4 of the act. Only arguments pertaining to the alleged violations of section 6(7) were set forth.

CM purchases various automobile parts and components and ships them in carload lots from Detroit, Mich., to Laredo, Tex., which is adjacent to the Mexican border. From the border, the shipments are transported to Mexico City by Mexican carriers. Freight charges are collected by defendants for the movements from Detroit to Laredo, and by the Mexican carriers for the movements from the Mexican border to Mexico City. No joint through rates are available from Detroit to Mexico. Freight costs to Laredo are prepaid by the shipper, Chrysler Corp., and passed through to CM.

Defendants assessed charges from December 17, 1970, to December 17, 1973, under single-factor through export rates from Detroit to Laredo ranging from $3.34 to $3.72 per 100 pounds, minimum weight 40,000 pounds.[1] Complainant contended that rates of $3.70 to $4.24 per 100 pounds, minimum 30,000 pounds, should have been used. Since most, if not all, of the disputed shipments appear to have weighed less than 30,000 pounds, a net savings to complainant of $80,117.21 would result if these combination rates were applicable.

Complainant attempted to develop combination rates by application of the aggregate-of-intermediates provisions contained in item 50 of SWL Freight Tariff 331-D[2] (and its successor provisions). These provisions read substantially as follows:

> If on any shipment an aggregate-of-intermediate local, joint, and/or proportional interstate rates constructed via a route over which the through rate published in this tariff is applicable produces a lower charge than the through rate, such aggregate of rates will apply *** and the through rate has no application to any such shipment ***.

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[1] Rates were based on the following tariff provisions:

> From December 17, 1970, to July 31, 1971: items 750 and 760, section 3, SWL Freight Tariff 331-D, SWFP ICC 4916;
> From August 1, 1971, to May 19, 1973: items 850 and 860, section 4, SWL Freight Tariff 331-E, SWFB ICC 4960;
> From May 5, 1973 to December 17, 1973: items 900 and 910, section 4, SWL Freight Tariff 331-F, SWFB ICC 5079.

Rates in each item were the same, and differed only in application of general increases.

[2] Unless otherwise indicated, rates and tariff provisions referred to herein will be those which were in effect on December 17, 1970. Subsequent amendments and changes did not substantially alter the effect of any of the provisions here in issue.

Implementation of item 50 is sought to be accomplished by constructing an aggregate of intermediate local rates from Detroit to Mirando City, Tex., and from Mirando City to Laredo.[3] The two factors of this combination rate are taken from the domestic scale rates found in item 605.[4]

The parties disagreed on the interpretation of the provisions which limit the application of item 605. Complainant admitted that item 605 would not ordinarily apply because item 601[5] limits its application on export traffic via Laredo to closed cars not exceeding 53 feet 6 inches in length. All the cars used in the shipments in question exceeded such length. But, it was contended that there is no size restriction on Detroit-to-Mirando City domestic traffic, nor on Mirando City-to-Laredo export traffic, and that the scale rates do not contain any other restriction against their use on export traffic. Complainant argued that application of item 50 allows an intermediate point combination such as this to supplant any otherwise applicable single-factor through rate.

Defendants contended that complainant is precluded under the restriction in note 3 of item 601[6] from using the domestic rates contained in item 605 on export shipments to construct the second factor of its combination, from Mirando City to Laredo. Because Detroit is a sideline point named in SW/E-1005-A, ICC 4687, it was argued that no rate to Laredo provided in item 605, regardless of the origin of the movement to which such rate applies, can be utilized in determining charges on an export shipment from Detroit to Laredo loaded in a closed car exceeding 53 feet 6 inches.

In its reply, complainant sought to introduce evidence that the origin of the shipments was Warren, Mich., a suburb of Detroit, rather than Detroit itself. It was argued that the language of note 3 must be strictly construed, that Warren, Mich., is not named in SWL Freight Tariff SW/E-1005-A, and that since the restriction in note 3 does not contain the language "and points taking the same basis in NRBT 1-B, ICC 4900," or words to that effect, the provisions of note 3 are not applicable to points not named such as Warren.

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[3] Mirando City, Tex., is a point on the Texas Mexican Railway Co., having the same rate basis as Hebbronville, Tex., and is intermediate between Detroit, Mich., and Laredo, Tex., via an authorized route as shown in route F-830, SWL Freight Tariff 222-F, SWFB ICC 4752.

[4] Subsequent provisions are: item 720 of SWL 331-E, and item 730 of SWL 331-F.

[5] Subsequent provisions are: item 370 of SWL 331-E, and item 370 of SWL 331-F.

[6] Paragraph (a) of item 601 specifies that the domestic rates in the tariff applicable to border points such as Laredo will also apply to such border points on traffic for export to Mexico, subject to note 3. Note 3 reads in pertinent part as follows:

> On shipments originating at or destined to sideline points named in SWL Freight Tariff SW/E-1005-A, ICC 4687 and SW/W-1006-A, ICC 4629 rates will not apply in closed cars exceeding 53 feet 6 inches in length.

Subsequently, defendants moved to strike the evidence relating to the alleged Warren origin.

The Administrative Law Judge, relying largely upon a letter written to complainant by the Commission's Section of Rates and Informal Cases, dated June 7, 1973, found that complainant had not met its burden of proof. He also granted defendants' motion to strike inconsistent statements appearing in complainant's reply, including all evidence relating to the alleged origin at Warren, Mich., on the ground that the introduction of such new evidence in the reply would violate rule 49(a) of the Commission's General Rules of Practice, 49 CFR 1100.49(a), and would deny defendants the opportunity to introduce evidence regarding any issue related to the alleged Warren origin.

Exceptions to the Administrative Law Judge's initial decision were filed on October 6, 1975, by Southern Shippers Association, Inc., a firm of traffic consultants which has clients similarly situated to complainant, pursuant to rule 96(c) of the Commission's General Rules of Practice, 49 CFR 1100.96(c). It is argued that the Administrative Law Judge misconstrued the letter to complainant's counsel which actually constituted an informal ruling in favor of complainant. The contention is made that note 3 would only apply when the factor sought to be used in the construction of the combination rate is for a shipment which both originated at a sideline point named in tariff SW/E-1005-A and terminates at a named border point such as Laredo. Since neither factor used meets both qualifications, it is argued that note 3 has no application.

In reply, defendants assert that no exception was stated on which relief could be granted, that the exceptions did not comply with the Commission's General Rules of Practice, that they have unduly broadened the issues in this proceeding, and that the failure of complainant to respond separately should lead to an unfavorable inference against it.

DISCUSSION AND CONCLUSIONS

The Administrative Law Judge correctly held that admission of evidence relating to alleged shipment origin at Warren, Mich., would violate rule 49(a) of the Commission's General Rules of Practice, since such evidence was offered for the first time in complainant's reply. The crux of this proceeding centers on a narrowly defined question of tariff applicability and interpretation under section 6(7) of the act. To allow complainant to redefine the issues without adequate opportunity for defendants' response is impermissible. Complainant's initial complaint framed the parameters of the controversy; it cannot later change the scope of the proceeding because of its own inadequate presentation. Therefore, the tariff provisions must be interpreted and applied with Detroit considered as the origin of the affected shipments.

It is obvious that the Administrative Law Judge misconstrued the letter submitted by complainant, since the letter constituted an informal ruling in complainant's favor. However, such error is not dispositive of the matters in issue because the letter did not contain a correct interpretation of the applicable tariff provisions.

Complainant sought to construct combination rates under item 50 by using a two-step process. First, a domestic-rate factor based on item 605 from Detroit to Mirando City was used. To this was added an export-rate factor from Mirando City to Laredo. The dispositive issue is whether or not note 3 to item 601 is applicable.[7] If it is, then item 601(a), specifying that the domestic rates to Laredo (provided in item 605) will apply to traffic to Laredo for export to Mexico, will not apply, and the proffered export-rate factor from Mirando City to Laredo will be invalid.

The three preconditions necessary to the application of note 3 are all present. All movements took place in closed cars exceeding 53 feet 6 inches. Detroit is a sideline point in SWL Freight Tariff SW/E-1005-A, ICC 4687. All the shipments in question originated at Detroit. The meaning of the word "shipment" is unambiguous. A shipment is a quantity of freight moving from origin to destination on a single bill of lading.[8] The complainant's initial pleading shows the bill-of-lading origin to be Detroit. The argument of the intervener that the point at which the particular rate factor originates must be a named sideline point is clearly erroneous.[9]

We find that note 3 is applicable, that complainant did not present a valid aggregate, and has not met its burden of proof to show that the rates charged by defendants are inapplicable or otherwise unlawful.

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[7] Note 3 flatly prohibits application of the Mirando City-to-Laredo rate on export shipments originating at Detroit in cars exceeding 53 feet 6 inches, as the shipments involved here did.

[8] A discussion as to what is contemplated when the term "shipment" is used in a tariff is included in the last paragraph on sheet 6 of the Administrative Law Judge's initial decision in No. 35572, *Stokely-Van Camp, Inc.* v. *The Atchison, T. & S. F. Ry. Co.* Review Board Number 4 adopted the Administrative Law Judge's report by decision and order served February 21, 1973.

[9] Moreover, it appears that a reasonable construction of note 3 in item 601 would likely preclude application of a lower aggregate of intermediates from Warren, as well as from Detroit. In the National Rate Basis grouping tariff Warren is grouped with Detroit. It was the obvious intention of the framer of note 3, in referring to sideline points named in SWL Freight Tariff SW/E-1005-A, ICC 4687, that such reference should include not only the key points in official territory, but also points which in the National Rate Basis tariff are grouped with the key points. A contrary interpretation would result in obvious unjust discrimination.

It is ordered, That the complaint filed in this proceeding, be, and it is hereby, dismissed.

No. 35937

LEHIGH VALLEY RAILROAD COMPANY, JOHN F. NASH AND ROBERT C. HALDEMAN, TRUSTEES, PETITION FOR DECLARATORY ORDER

Decided March 15, 1977

Upon petition for a declaratory order, assailed rates on 59 mixed carload shipments found to be applicable, but unjust and unreasonable. Just and reasonable rates determined, and proceeding discontinued.

J. Edgar McDonald for petitioner.
William J. Augello for replicant.

REPORT AND ORDER OF THE COMMISSION

DIVISION 2, COMMISSIONERS HARDIN, O'NEAL, AND CHRISTIAN

BY THE DIVISION:

The modified procedure was followed. Exceptions to the initial decision of the Administrative Law Judge were filed by the petitioner, Lehigh Valley Railroad Company (Lehigh), to which replicant-shipper (Chicago Shippers Association or CSA) replied. Exceptions and requested findings not specifically discussed, nor reflected in our conclusions or findings, have been considered and found not justified. Our conlusions differ in part from those of the Administrative Law Judge.

The facts were adequately stated in the initial decision of the Administrative Law Judge and are adopted as our own. They are restated and expanded here only insofar as is necessary for a proper understanding and resolution of the issues on exceptions.

After initiating court action[1] against the Chicago Shippers Association to recover additional charges on 59 prepaid shipments, Lehigh, with permission of the court, petitioned the Commission for a declaratory order as to the charges legally applicable on such shipments. The shipments consisted of 139 carloads of mixed freight described as "freight, all kinds" (FAK) and were made in batteries of two or more cars. Freight charges were paid on the basis of item 13555 of Trans-Continental Freight Bureau Tariff No. 1 series[2] which in pertinent part provides that all cars in each battery are to be tendered within a 24-hour period, and that the weight of any one article in any car must not exceed 50 percent of the weight in that car, except that such limitation may be exceeded as to one car in each shipment provided the weight of the article in such car does not exceed 25 percent of the weight of the entire shipment.[3] The per-car rates are subject to certain maximum weights varying with the type and size of car, with additional charges specified for weight in excess of the maximum. Item 13555 further provides that the shipper shall certify on the bill of lading that the shipment meets the requirements of the mixture provisions, but it does not provide for situations where those requirements are not totally met. In the absence of specific mixture rates, mixed carload shipments are rated according to the provisions of item 135 of tariff No. 1.[4] That item essentially provides that each article in the carload will be charged at its actual weight and straight carload rate, that the carload minimum weight will be the highest provided for any article in the mixture with any deficit in the minimum weight to be charged at the highest rate for any article in the carload, but that if lower charges will result, one or more articles shall be treated as contraband and charged on the basis of the less-than-carload (LCL) rate.

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[1] John F. Nash and Robert C. Haldeman, Trustees of the Property of the Lehigh Valley Railroad Company, Debtor, Plaintiff v. Chicago Shippers Association, Defendant, Superior Court of New Jersey, Law Division-Hudson County, docket No. L-12303-71.

The majority of the 139 individual carloads at issue consisted of a variety of articles which met the mixture requirements of item 13555. In those instances where there were violations the infractions were sometimes slight enough that they could have been overcome by shifting the excess weight to other cars in the same shipment; at other times the infractions were more substantial—on most of the infractions the weight of a single commodity exceeded 60 percent of the weight of all commodities in the same car. Regardless of the fact that most of the individual carloads complied with the mixture requirements of item 13555, at least one car in each of the 59 shipments did not. Consequently, petitioner re-rated articles in all 139 cars pursuant to the provisions of item 135, resulting in charges which roughly aggregate $281,604. Since CSA has prepaid $120,138 (the aggregate of charges based on item 13555), the balance claimed to be due is $161,466.

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[2] During the period of movement involved (January 10, 1969, through December 22, 1970) the wording of item 13555 remained the same in all issues of tariff No. 1 then in effect (ICC Nos. 1770, 1789, and 1806).

[3] Note 1 in item 13555 provides the following rate application:

> (a) Rates apply only on mixed shipments loaded in two or more cars, shipped within any period of 24 hours by one consignor from one origin to one consignee at one destination, consisting of 5 or more different commodities which are separately described in Uniform Classification or in different items in this tariff and the weight of any one article in any car must not exceed 50 percent of the weight in that car, except one car in the shipment may be loaded with more than 50 percent of one article provided the weight of any one article in such car does not exceed 25 percent of the weight of the entire shipment.
>
> (b) The rates per car are subject to a combined maximum weight reflecting the sum of the maximum weights applicable to the cars used for the entire shipment. Weight in excess of the total maximum weight thus determined will be assessed charges on basis of the following rates: [rates are then listed].

[4] Although the parties initially disagreed as to applicability of item 135 to the shipments here involved, no exception is taken to the finding that it does apply. There is no substantial dispute as to petitioner's computations under that item.

With regard to the issue of applicability, replicant argued that item 13555 should be interpreted so that the 50-percent and 25-percent weight limitations for any one particular commodity may be applied against either the maximum or actual weight, whichever produces the less contraband (excess weight); and that the LCL rate should be applied to the contraband since petitioner treated excess weight in that manner in calculating the undercharges on many cars.

Should the Commission disagree with such an interpretation as to applicability of the item 13555 rates, replicant proposed as a first alternative that the rates and charges computed under item 135 be found unjust and unreasonable to the extent that such item fails to permit relating the 50-percent and 25-percent mixture limitations to either the maximum or actual weight on the car or shipment, whichever produces the lower amount of contraband, and fails to include a provision authorizing an additional charge for contraband. As a second alternative, replicant proposed that where a car contains lading which violates the mixture provision such car should be billed under item 135 while all other cars comprising the shipment should be billed under item 13555.

The difference in impact between these alternatives is illustrated by shipment No. 2 upon which petitioner claims undercharges of $4,482.72 (difference between $6,926.52, billed on the basis of item 135, and $2,443.80, prepaid on the basis of item 13555). Under the first alternative (contraband charged at LCL rate) undercharges would amount to $63.33, whereas under the second alternative (only those cars violating mixture provisions to be billed under item 135) undercharges would amount to $1,663.42.

Replicant further argued that the asserted deficiencies would have been corrected if the carrier had called them to its attention, that the shipments included traffic of some who are no longer members of CSA (one major former member has since become bankrupt and discontinued business), and that it would be extremely difficult for replicant to pay the exhorbitant amount now sought 7 years after movement.

The Administrative Law Judge concluded that the action at law was timely filed with respect to all 59 shipments, that the association had not complied with all provisions of the tariff, thus rendering the rates and charges under item 13555 inapplicable, and that the rates and charges sought to be collected by petitioner were applicable, but that the applicable rates and charges are unjust and unreasonable.[5] The just and reasonable charges were found to be those constructed by relating the 50-percent and 25-percent mixture limitations to either the maximum or the actual weights per car or shipment, whichever produces the smaller amount of contraband, and by basing the charges for commodities in excess of the percentage limitations on the LCL rate or rating at the actual weight of the overage;[6] waiver of undercharges to such basis was authorized.

On exceptions, petitioner objects to the finding that the Commission had jurisdiction to consider the justness and reasonableness of the rates. Lehigh contends that since nothing in its petition or underlying court action presented such an issue and since the replicant failed to file a complaint with the Commission[7] or to raise reasonabless as a defense in the court action, replicant is precluded from raising that issue in this proceeding.

Petitioner also excepts to the Administrative Law Judge's conclusion that failure to include a ready and practical way to determine applicable charges in event of an infraction of the mixture rule *is* an unjust and unreasonable practice because the proceeding involves shipments that moved in the past.

In excepting to the conclusion that the applicable charges were unjust and unreasonable, petitioner contends that there was no misunderstanding of the rule; that CSA, having failed to deny petitioner's allegation, is deemed to have admitted assuring Lehigh that the shipments complied with the rule, and consequently there was no need for petitioner to check the makeup of the shipments upon receipt; and that in such circumstances it would not be a "harsh and unjustified" penalty to charge the applicable rate.

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[5] No exceptions were taken to the Administrative Law Judge's finding of inapplicability of the rates charged. The Administrative Law Judge also stated that the absence of a simple, clear statement for determining applicable charges when there has been a violation of the mixture provisions is an unreasonable practice and that to exact the applicable charges under such circumstances would be a "harsh and unjustified" penalty. However, such conclusion was not set forth in the list of ultimate findings.

[6] The practical effect of such finding would be to apply the item 13555 FAK rates on every car in the shipments.

[7] Under section 16(3)(d) CSA could have filed a complaint with the Commission within 90 days after Lehigh instituted court action, nothwithstanding expiration of the 2-year statutory limit set forth in section 16(3)(b).

Finally, Lehigh states that there is no record support for the conclusion that the just and reasonable charges would be those made by applying the item 13555 per-car rates to each car comprising a given shipment; and that such a radical departure from the specific tariff provisions is arbitrary and an indirect discrimination against the many freight forwarders who have used the rates in compliance with the provisions of item 13555. According to Lehigh, there is no evidence as to either the reasons and basis for establishing the mixture provisions at issue, the extent that weight overages occurred on shipments made by other users of the rate item, the impact on overages in relation to cost of service and profitability, or the compensativeness of applying the LCL rate on such overages. Lehigh fears the proposed modification of the mixture provisions will spread beyond item 13555 and operate to the detriment of the transcontinental railroads.

In reply, replicant asserts that since Lehigh's court action initially alleged a violation of only the 24-hour rule, the issue of reasonableness was raised properly for the first time in its reply to Lehigh's petition herein, and in any event reasonableness is always in issue; that the Commission is not required to interpret tariffs in a vacuum, but may consider all the surrounding circumstances; that Lehigh's contentions relative to shipper's assurance of compliance with the mixture rule negating carrier's need to check the makeup of shipments is invalid since the Commission has long held that a failure to answer a complaint does not constitute an admission of violations alleged therein; and that the Administrative Law Judge had power to take official notice of the purposes for which FAK rates are instituted—to attract traffic, simplify billing and rating, and encourage greater utilization of otherwise empty cars; and that there is no basis for concern about the impact of this decision upon other carriers since it is limited to the parties involved.

DISCUSSION AND CONCLUSIONS

This proceeding is before the Commission pursuant to an order of a State court authorizing plaintiff, the petitioner herein, to file a petition for a declaratory order under the authority of section 554(e) of the Administrative Procedure Act, 5 U.S.C. §554(e), for the resolution of all issues in dispute. The initial decision of the Administrative Law Judge has served to significantly reduce those issues. Thus, no exception is taken to the finding that the action at law with respect to the involved shipments was timely filed, a finding based upon the determination that section 16(3)(a), which establishes a 3-year limit for filing carrier actions, did not require petitioner to provide the precise reasons for the undercharges within that period since the general thrust of the action was apparent. Neither is any exception taken to the finding that, based upon a determination that the governing tariff provision is clear and unambiguous, the charges which petitioner seeks to collect are applicable. Both findings properly reflect the law and the facts. Accordingly, we affirm and adopt the findings of the Administrative Law Judge that the action at law with respect to all 59 shipments was timely filed, and that the rates and charges sought to be collected on such shipments are applicable.

We also agree with the Administrative Law Judge that the sought rates and charges are unjust and unreasonable as applied to the particular shipments involved. However, we do not agree that the just and reasonable charges should be those constructed on the basis provided for in the initial decision, a basis suggested by replicant as a first alternative in the event the sought charges were found to be applicable. We favor instead the basis suggested by replicant as a second alternative.

Petitioner's first major exception relates to the finding that the Commission has jurisdiction to consider the reasonableness of the rates at issue. Petitioner's contention that the Commission lacked such jurisdiction is predicated on the assumption that replicant was precluded from raising rate reasonableness as an affirmative defense since the 2-year statute of limitations for complaints against carriers had expired and more than 90 days had passed since the action at law was instituted. We do not accept such a position. The leading authority in this area is *United States* v. *Western Pac. R. Co.*, 352 U.S. 59 (1956), which holds that section 16(3) does not apply when questions are referred to this Commission incident to judicial proceedings. The court explained that section 16(3) indicates on its face that it pertains "only to the commencement of actions or reparation proceedings." Further, the decision continues, the basic policy of statutes of limitations is to keep stale litigation out of the courts—that is, they are aimed at lawsuits and not the consideration of particular issues in lawsuits. There, as in this proceeding, the action was already, and timely, before the court. Thus, it was found to be improper to hold that once a lawsuit was before the court, decision was to be made without consideration of all the issues in the case and without the benefit of all the applicable law. It follows logically that if the litigation is not stale, then no issue in it can be deemed stale. The doctrine set forth in *Western, supra,* is not restricted to situations in which the United States is the shipper, but also applies to private shippers. Docket No. 36067, *Niedermeyer-Martin Co.—Petition for Declaratory Order—Interpretation of Tariff* (unprinted decision dated May 24, 1976), affirmed by division 2, November 9, 1976. Nor is there any basis for restricting the doctrine to actions instituted in Federal courts, for section 16(3) refers only to "actions at law." Accordingly, we find that there was no lack of jurisdiction in the Commission to rule upon the reasonableness of rates herein found to be applicable. In the event that the State court authorizing the filing of the petition herein were subsequently to find that replicant had waived its affirmative defense, as alleged, by failing to timely raise the issue of reasonableness in the court proceeding pursuant to the relevant rules of practice, the petitioner could not be prejudiced by our findings herein regarding that issue. We note that the court granted Lehigh permission to petition this Commission for "resolution of all issues in dispute," and it is our intent to give the court the benefit of our determinations respecting all issues raised including the reasonableness of the charges sought to be collected.

Petitioner's other exceptions relate to findings that the applicable rates and charges are unjust and unreasonable and that the just and reasonable rates and charges should be those made by applying the item 13555 rates to each of the cars in the shipment. Before discussing such findings it is pertinent to note that while the involved carloads of mixed freight were all shipped in batteries of two or more cars, the per-car rates herein found to be applicable are also applicable to single-car movements. Hence, in assessing the reasonableness of such rates it is immaterial that other cars in the same shipment may have contained a different category of traffic.

As stated previously, most of the individual carloads consisted of a variety of articles that clearly met the mixture requirements of item 13555. However, the multicar FAK rates were inapplicable to such individual carloads because they were included in the same shipment as other cars which failed to completely meet the mixture requirements. Unfortunately, item 13555 provided no basis for determining the applicable rates on such hybrid FAK multicar movements.[8] Consequently the much higher single-car rates and charges under streamlined rule 10 of item 135 became applicable, not only as to cars that failed to meet the mixture requirements, but also as to those cars that actually met such requirements.

We see no reason to question the reasonableness of the item 135 rates and charges insofar as they apply to cars failing to meet the car mixture requirements, for the traffic mix in such cars differed in essential character from that for which the item 13555 rates were designed. In some instances there were fewer than 5 commodities and in all instances the weight of a single commodity clearly exceeded the 50-percent limitation of item 13555.[9] A careful examination of the infractions reveals that while they were sometimes slight, they were generally substantial—substantial to the extent that the weight of a single article most often exceeded 60 percent and some times exceeded 90 percent of the weight of the entire carload. To suggest that the reasonableness of per-car charges on lading which clearly disregards the item 13555 mixture requirements should be related to the item 13555 per-car charges would, in our judgment, tend to weaken the integrity of the FAK mixture and thus be contrary to the very purpose of the rule. It is true that determination of the item 135 rates and charges could involve tedious work on the part of those concerned, but the highly experienced freight forwarders and shippers associations who utilize these special FAK rates are surely aware of that fact when arranging their carloading.[10] Moreover, in the particular situation involved, the tedious task of determining the rates on each commodity was performed by the railroad petitioner.

Although we see no reason to disturb the finding of applicability of rates and charges as to individual cars that violated car mixture requirements, we find ample reason for questioning the reasonableness of such rates and charges as to individual cars that met the car mixture requirements. The traffic mix in such cars was identical in character to that for which the item 13555 rates were designed. The only extent to which these individual carloads differed from those moving under item 13555 rates was that they happened to be included in the same shipments as other carloads that failed to meet the mixture requirements. Despite this fact petitioner seeks to collect undercharges which penalize cars loaded in full compliance with the mixture rule in the same manner as cars loaded in violation of the rule. The severity of that penalty is reflected in the fact that the average charge applied to a carload complying with the rule is more than double the amount the charge on that identical carload would have been had it been shipped with another carload containing a like mix of traffic. While we recognize a theoretical operational distinction between multicar movements of mixed freight under item 13555 and multicar movements under item 135, we are convinced that such a wide spread cannot be justified on the basis of a difference in character of the mixed freight in some other car in the same shipment. Since no other justification has been offered, we are of the view that exaction of the applicable charges would be unjust and unreasonable as to cars which meet the item 13555 mixture requirements.

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[8] As the Commission stated in Ex Parte No. 230, *Substituted Service—Piggyback*, 322 I.C.C. 301, 380, "*** we also think it desirable that *** the tariff specify the means by which the applicable rate will be determined should a shipment fail to qualify for the all-freight rate."

[9] The 50-percent single-commodity rule is a widely recognized limitation observed in connection with FAK rates that extend beyond the scope of this proceeding.

[10] Endorsements on the bills of lading to the effect that the cars were loaded in compliance with the mixture requirements of item 13555 could in no way have altered the character of the freight that CSA actually loaded.

It is concluded that just and reasonable rates and charges on the considered shipments would be those made by applying the item 13555 per-car rates to each car that met the car mixture requirements of that item and by applying the mixed carload rates developed pursuant to item 135 to each car that failed to meet the car mixture requirements of item 13555.

Use of the rates determined in the above manner is believed justified in the particular situation because, while recognizing the need for more than a token penalty to discourage repetitive tariff violations[11] it limits the penalty to the particular traffic that actually produces the violation. This method will produce undercharges of approximately $59,079, substantially more than would have been produced under the initial decision. The fairness of this method is recognized by replicant who has advanced it as an acceptable alternative. The departure from provisions of the tariff is slight and covers a situation which the tariffmaker did not adequately provide for and probably did not even contemplate. Thus, by filling a gap in the rule to blend with its intent, the rule is clarified and its integrity is preserved. Inasmuch as the same mixture standards are required of replicant as of freight forwarders and others who may have used and fully complied with the provisions of item 13555 there should be no cause for concern about the possibility of unjust discrimination or the spread of lax loading practices. Moreover, our decision herein is limited to the peculiar factual situation involved.

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[11] Violations of the mixing rule occurred on about 42 percent of the 139 cars.

We find that the rates and charges sought to be collected are applicable, but that the applicable rates and charges are unjust and unreasonable as applied to carloads of mixed freight which individually met the mixture requirements of item 13555, but which were included in the same shipment as carloads of mixed freight which did not meet such mixture requirements.

We further find that the just and reasonable charges on the shipments at issue would be those made by applying the item 13555 per-car charges to each car which met the car mixture requirements of that item and by applying charges based upon rates herein found to be applicable (mixed carload rates developed pursuant to item 135) to each car which failed to meet the car mixture requirements of item 13555.

We further find that the action at law with respect to all 59 shipments was timely filed.

And we further find that this decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

It is ordered, That this proceeding be, and it is hereby, discontinued.

No. 36317

SOUTHERN RAILWAY COMPANY—PETITION FOR DECLARATORY ORDER—RIGHT OF INDEPENDENT ACTION

Decided February 15, 1977

Right of independent action of member carrier of ratemaking organization not infringed by tariff publishing agent's refusal to publish change in joint rates lawfully filed and published, in the absence of affirmative concurrence of other carriers participating in the joint movement. Proceeding discontinued.

James L. Howe III and *James L. Tapley* for petitioner.

C. W. Bath, Dickson R. Loos, Walter J. Myskowski, George M. Onken, and *Richard H. Stockes* in support of petitioner.

A. C. Amstrong, Harry L. DeLung, Jr., R. J. Murphy, Robert T. Opal, C. C. Rettbert, Jr., and *D. M. Tolmie* for replicants.

Dellon E. Coker for the U.S. Department of Defense in opposition.

REPORT OF THE COMMISSION

DIVISION 2, COMMISSIONERS HARDIN, O'NEAL, AND CHRISTIAN

BY THE DIVISION:

By petition filed February 18, 1976, Southern Railway Company (Southern) requests the Commission to enter a declaratory order pursuant to section 554(e) of the Administrative Procedure Act, determining that it is not permissible under section 5a(6) of the Interstate Commerce Act (act) to construe a provision in an agreement under that section of the act so as to prohibit the exercise of the right of independent action by a party to that agreement between the time a change in a joint rate requiring concurrence has been filed with the Commission, but prior to the effective date of the tariff change. The purpose is to terminate a controversy between petitioner and its connecting railroad participants in joint rates.

By notice issued May 3, 1976, and published in the Federal Register, the Commission requested replies from interested persons concerning the matter raised on petition. Farmland Industries, Inc. (Farmland), Aluminum Company of America (Alcoa), and The Long Island Railroad Company (LIRR) replied in support of petitioner. The western and eastern railroads and the Department of Defense responded in opposition. Requested findings and arguments not specifically discussed in this report nor reflected in our conclusions or findings have been considered and found not justified.

The Nation's railroads collectively establish their rates and related tariff matters pursuant to certain agreements approved by the Commission under section 5a of the act. Consistent with paragraph (6) of section 5a, these agreements confer upon each signatory carrier party the free and unrestrained rights of independent action before or after any determination arrived at through the agreement procedures.[1]

The facts are not in dispute. As pertinent, the Commission by order of January 22, 1976, permitted the railroads to jointly publish and file a 7-percent general increase master tariff for virtual nationwide application, with certain exceptions, upon not less than 30 days' notice to the Commission and the public, subject to protest and possible suspension. After the increase tariff was duly filed with the Commission, but prior to the scheduled effective date of February 24, 1976, the Southern discovered that it had inadvertently concurred to increase both single-line and joint-line rates for its account on aluminum products originating on its line at Warwick, Ind. It promptly notified the carrier's rate bureau of its intention to nonconcur in the increase and instructed the tariff publishing agent to take the steps necessary to reflect Southern's nonconcurrence and the nonapplication of the increase on the involved traffic. The requested tariff change was accomplished as to the single-line rates which are not involved herein. As to the joint rates, the tariff publishing agent refused to comply with the tariff publication instructions of Southern on the grounds that the other joint-line connecting railroad participants were unwilling to concur to Southern's requested rate changes.

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[1] By virtue of Public Law 94-210, enacted February 5, 1976, ratemaking agreements among railroads were made subject to a new section 5b of the act, in lieu of section 5a. The section 5b rail agreements were filed and became operative under interim approval of the Commission effective November 1, 1976. The independent action provisions of paragraph (6) of section 5a here in issue are incorporated in paragraph (5)(a) of section 5b and the conclusions reached in this proceeding under section 5a equally applies in similar situations arising under section 5b of the act.

Southern alleges that the refusal of the tariff publishing agent to comply with its instructions regarding the joint rates is a clear invasion upon its right of independent action guaranteed under section 5a(6) of the act and in accordance with the governing section 5a agreement provisions. It argues that the concurrences of its joint-line connections are not necessary on the grounds that it has the right to take any action it sees fit prior to the effectiveness of any proposal affecting a joint rate covering movements of freight over its line and the lines of its connections. In support, Southern cites the independent action provisions of section 12, article III, of the ratemaking agreement among the eastern railroads approved by the Commission in section 5a application No. 3 (277 I.C.C. 279 (1950), and as amended from time to time), to which it is a party for processing rates on the involved traffic. Reliance also is placed on the decision of Second Circuit Court of Appeals in *Ajayem Lumber Corp.* v. *Penn Central Transp. Co.*, 487 F. 2d 179 (1973), for the proposition that a railroad can exercise its right of independent action to opt out of a genral increase; and also the pronouncements of the Commission in Ex Parte No. 297, *Rate Bureau Investigation*, 351 I.C.C. 437, 459-460, to the effect that the right of a carrier member of a ratemaking bureau to take independent action before or after the collective ratemaking process is absolute under section 5a(6) of the act.

Farmland supports petitioner that a carrier's right of independent action is absolute. Alcoa, the shipper at Warwick, characterizes Southern's action as one in the nature of a correction of a tariff error on the grounds that Southern never intended to concur in the increase of the involved joint rates. The supporting shipper maintains that Southern is not being allowed to correct a mistake in a tariff publication which is contrary to the public interest and the carrier's right of independent action. It further argues that consideration must be given the fact that the controversy arose as the result of a general increase master tariff and that a carrier has not only the right, but also the duty, to correct inequities in master increase tariffs when such situations come to its attention.

The Long Island Railroad Company takes the position that the right of independent action may be exercised by any railroad prior to the effective date of the tariff, but when exercised subsequent to the filing of a tariff, the provisions of section 6 of the act necessarily must be observed. It maintains that the requirements of section 6 do not modify the right of independent action conferred by section 5a of the act.

The western railroads allege that the relief requested by petitioner does not accurately portray the factual controversy at issue. It is their contention that the question presented for resolution is whether the Southern, after concurring in the master increase tariff, can unilaterally change the tariff so as to remove the joint-line rates in question from the increase by an exercise of "independent action" after the tariff has been filed with the Commission. It is submitted that, in such circumstances, the concurrences of the other railroads participating in the joint rates are required because section 5a(6) does not give an individual carrier any greater authority over joint-line rates made through a section 5a ratemaking organization then the carrier would have over joint-line rates negotiated with its connecting lines outside a 5a organization. It is stressed that the legal obligations of the parties to a tariff become fixed on the filing date under section 6(3) of the act and the Commission's tariff publishing rules, and that changes in joint-line rates after filing must be with the concurrence of the parties thereto. It is argued that the *Ajayem* case, *supra,* does not support, and is contrary to, Souther's position because the factual situation therein differs from that in the instant proceeding. It is pointed out that in *Ajayem* the railroad did not concur in the master increase tariff as proposed and communicated its nonconcurrence to the tariff publishing agent prior to the filing of the increase tariff, and not after as sought by Southern. The eastern railroads support and reiterate the position of the western railroads.

The Department of Defense avers that the position of Southern is prohibited by section 6(3) of the act. It argues that the right of independent action under section 5a(6) cannot be invoked to nullify the statutory prohibition of section 6(3) against changing filed and published rates, regardless of whether or not such rates have become effective.

Discussion and Conclusions

At issue is whether Southern, individually, can exercise a right of independent action so as to withdraw a concurrence and eliminate an increase in joint rates without the noncurrences of the other joint-line participating railroads after the increased rates tariff has been filed with the Commission, but before it becomes effective. Petitioner maintains that such action is permissible under section 5a(6) of the act which guarantees each member carrier of a ratemaking organization the right to take independent action either before or after any determination arrived at collectively. The parties in opposition disagree and argue that petitioner's action constitutes a change in existing joint rates which requires the concurrence of the other carriers participating in the joint rates.

Section 5a of the act is a permissive statute whereby two or more carriers may apply to the Commission for approval of an agreement between and among themselves to engage in collective ratemaking under immunity from the operation of the antitrust laws when making and carrying out the terms of the agreement. Such agreements comprise the organization and procedures under which the signatory carriers conduct their ratemaking activities. The section 5a statute and agreements approved thereunder do not modify, change, or amend the requirements of any regulatory or other provision of the act regarding the lawful publication and establishment of rates and related matters.

Official notice is taken of the approved section 5a eastern railroads agreement upon which Southern relies to support its position. Article III sets forth the procedures for carrier processing of rate proposals. In accordance therewith, the processing of a rate proposal is completed and the procedures terminated when all affected carriers have had the opportunity to determine and advise the rate bureau the final action to be taken for the individual accounts of the affected carrier participants, including the exercise of a right of independent action.

Here, the Southern acquiesed and agreed with its joint-line connecting carriers to increase the joint rates from Warwick. Under the terms of the considered agreement, the adoptive concurring action of each of the joint-line carrier participants disposed of such joint-rate increase proposal and terminated the agreement handling of the proposal. Thereafter, the tariff publishing agent performed on behalf of the adopting joint-line carriers the ministerial function of tariff publication and filing with the Commission in accordance with the carriers' instructions. There is nothing in the considered agreement to permit or authorize a joint-rate carrier participant to resurrect and recall for further action or review a joint-rate proposal upon which the affected carrier participants have taken final action. To effectuate a further change in an adopted joint-rate proposal, the proper procedure and remedy, if any, is the initiation of a new joint-rate proposal for processing among the joint-line carrier participants. In the circumstances, we conclude that the considered agreement confers no authority upon the Southern to request withdrawal of its previously given concurrence after the joint-rate increase proposal had been disposed by final action under the agreement procedures, and that the rate bureau properly treated such withdrawal request as a new joint-rate proposal for action by the other joint-line carrier participants.

Southern's allegation of an invasion of its right of independent action and its reliance upon the *Ajayem* case, *supra*, and the pronouncements of the Commission in Ex Parte No. 297 do not support its position. The facts in the *Ajayem* case are clearly distinguishable from those in the instant proceeding. In *Ajayem*, a carrier participant in joint rates specifically notified the rate bureau of its noncurrence to a pending joint-rate increase proposal prior to final action by the joint-line carrier participants and took every step possible to "flag out" against publication of increased joint rates for its account. Nevertheless, the increase was published for such carrier's account on grounds which are not pertinent to resolution of the issue raised herein. Here, the Southern voluntarily issued its concurrence to a proposal to increase the joint rates for its account from Warwick, whereas the carrier in *Ajayem* did not concur. In the light of the substantially different factual situation, we conclude that the *Ajayem* case, *supra*, is not pertinent and has no application in the instant proceeding.

The reliance placed upon Ex Parte No. 297, as conferring upon carriers an absolute right of independent action, wholly disregards the differences, in fact and in law, between local rates over the lines of one carrier in which a carrier has an absolute right of independent action, and joint rates applying over the lines of several carriers as hereinafter discussed. It must be borne in mind that the independent action provisions of paragraph (6) of section 5a of the act confer no greater right of ratemaking upon an individual rail carrier than accorded under the regulatory provisions of section 6 of the act. Such regulatory provisions require rail carriers to publish and maintain schedules of their rates and related tariff matters and, in accordance therewith the Commission issued Tariff Circular No. 20 prescribing the rules governing the publication and filing of rail carrier tariffs which are codified in the Code of Federal Regulations at 49 CFR 1300. The section 6 statute and the implementing tariff rules clearly distinguish between "rates" and "joint rates" of a carrier. The preamble of the tariff circular defines the various types of rates as used therein. A "local rate" means a rate over the line of one carrier. The term "joint rate" is defined to mean a rate that extends over the lines of two or more carriers which is made by arrangement or agreement between such carriers and evidenced by concurrence or power of attorney. In connection with the latter, rule 52 of the tariff circular further provides that the tariff-issuing carrier or agent is required to secure definite authority from each carrier participant in a joint rate before tariff publication, and that the publication and filing of a joint rate without the authority of each carrier participant is unlawful. In essence, the interests of the several carrier participants in the involved joint rates are merged, into a single entity, for ratemaking purposes and no one individual carrier can require change in an agreed upon joint rate without the concurrences of each carrier participant.

Notwithstanding the foregoing regulatory requirement for concurrences of each joint-rate carrier participant, attention is directed to section 6(3) of the act, in conjunction with rule 54(a) of the tariff circular, regarding the tariff publication of changed rates. Such rule states that section 6(3) refers to rates which have already become effective and also applies the term "proposed changes" to rates which have not become effective; and that after notice of a change in rates has been published and filed, the new (changed) rates must be allowed to go into effect, and cannot be changed, withdrawn, or canceled for at least 30 days after the date when the rates become effective, except as otherwise specifically authorized by the Commission.

In view of the foregoing, it is clear that an individual participating carrier in a joint rate cannot, unilaterally, undertake to alter the terms as mutually agreed upon by the joint-line carrier participants after lawful publication and filing with the Commission. The time of filing of such joint rate, and not effective date, determines when such rates becomes binding on the carrier participants. To hold otherwise, would violate the provisions of section 6 of the act.

We conclude and find that the action of the tariff publishing agent in refusing to comply with the unilateral instructions of Southern to cancel increased joint rates which were lawfully published and filed with the Commission was proper and consistent with section 6 of the act in the absence of the concurrences of the other joint carrier participants, and further that there was no invasion upon Southern's right of independent action under section 5a(6) of the act.

COMMISSIONER O'NEAL, dissenting:

I cannot agree with the majority that section 6(3) of the act or rules 52 and 54 of Tariff Circular No. 20 mandate the result reached herein. Section 6(3) and rule 54 clearly relate to the notice required to change rates. While rule 54 does embrace proposed rates in the class to which notice of changes must be accorded, it is silent as to the time at which a carrier party to a joint rate can revoke its concurrence to a proposed rate change. And while rule 52 requires that authority from all carriers participating in a joint rate be secured prior to publication and filing, it does not reach the issue of revocation of such authority.

In essence, it appears to me that the majority's conclusions rest upon a policy decision that there must be some point at which the obligations of the parties to a joint rate become fixed. That there should be such a policy decision I agree, but I feel that the appropriate point should be the effective date of the proposal. It can be said that this would encourage a myriad of eleventh-hour withdrawals from joint-rate proposals, and that the resulting uncertainty as to which rates would be applicable might operate to the detriment of the shipping public. But carriers are not prohibited from changing individual rate proposals prior to the effective date. And eleventh-hour changes are deterred by the requirement that special permission be secured.

Simply stated, there is some degree of uncertainty surrounding any proposed tariff change until it becomes effective. Given the difficulties a joint-rate participant would experience in withdrawing from a joint-rate arrangement, protesting a proposed rate change, or successfully pursuing a complaint case after a proposal has become effective, it is my view that the rights of the parties should not become fixed until the tariff has become effective. This is especially true in the case of a complex general increase such as Ex Parte No. 318, where a mistake of fact on the part of one of the carriers is understandable.

It is ordered, That the proceeding be, and it is hereby, discontinued.

No. 35944

DRUG AND TOILET PREPARATION TRAFFIC CONFERENCE—PETITION FOR DECLARATORY ORDER—LIABILITY LIMITATION

Decided March 21, 1977

Declaratory order entered determining the meaning of the liability limitation of "50 cents per pound for each article" which is published in the National Motor Freight Classification in connection with released value ratings on drugs, chemicals, medicines, toilet preparations, or other related articles. Prior report modified. Proceeding discontinued.

Appearances as shown in prior report.

REPORT AND ORDER OF THE COMMISSION ON
FURTHER RECONSIDERATION

DIVISION 2, ACTING AS AN APPELLATIVE DIVISION, COMMISSIONERS
HARDIN, O'NEAL, AND CHRISTIAN

BY THE DIVISION:

In the prior report entered July 12, 1976, division 2 modified the decision of Review Board Number 4, interpreting the liability limitation of "50 cents per pound for each article" as published in the National Motor Freight Classification in connection with released ratings on drugs and related commodities, pursuant to authority granted in Released Rates Order No. MC-342. By order dated December 6, 1976, the proceeding was reopened for reconsideration on the present record. Requested findings not specifically discussed in this report nor reflected in our findings or conclusions have been considered and found not justified.

In Released Rates Application No. MC-525, dated June 9, 1952, certain carriers named in the National Motor Freight Classification and the American Trucking Associations petitioned the Commission for authorization under sections 20(11), 219, and 413 of the act to establish and maintain ratings for the transportation of property dependent upon the agreed or declared value stated therein, namely, "50 cents per pound for each article." The application stated that the sought ratings were justified because the Commission on May 27, 1952, had approved (in Released Rates Order No. 1104) comparable ratings and provisions for the railroads, which were to be concurrently published in their new Uniform Freight Classification No. 1.[1] The Commission granted the application pursuant to Released Rates Order No. MC-342, dated August 13, 1952. The ratings were subsequently published in the National Motor Freight Classification.

By petition filed on January 8, 1974, the Drug and Toilet Preparation Traffic Conference (petitioner), on behalf of its members, requested the issuance of a declaratory order interpreting the liability limitation on drugs and related commodities authorized in Released Rates Order No. MC-342 and published in the National Motor Freight Classification. The limitation provides for a certification by the shipper that "The agreed or declared value of the property is hereby specifically stated by the shipper to be not exceeding 50 cents per pound for each article." Petitioner, in effect, alleges that the liability limitation is ambiguous and that different interpretations of it are being applied by carriers in processing claims for loss and damage.

By order entered on April 25, 1974, the Commission, Division 2, determined that a controversy or uncertainty exists which would warrant the entry of a declaratory order, and it instituted a proceeding to determine the question presented. The Commission directed that the matter be handled under modified procedure, and the proceeding was subsequently assigned to an Administrative Law Judge for an initial decision.

In an initial decision, the Administrative Law Judge concluded that, in determining the limit of liability under the agreed valuation of 50 cents per pound "for each article" in the drug and chemical list, the agreed valuation should be multiplied by the weight of the smallest identifiable unit.

In a report and order on exceptions, Review Board No. 4 reached a different conclusion from that recommended in the initial decision, holding that, as used in the context of the released rates application and order, the word "article" means the case, container, or package.

In a report on reconsideration dated July 12, 1976, division 2 reached a conclusion similar to that recommended in the initial decision and differing from that set forth in the report of Review

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[1] The order which authorized rail ratings based on agreed values of "50 cents per pound for each article" was rescinded by Released Rates Order No. 1113 of December 10, 1953; that order, currently in effect, provides for agreed values of "50 cents per pound"—such values to be related "to the gross weight of each shipping package separately, and not to the shipment as a whole."

Board No. 4. A petition for reconsideration was filed by petitioner and adopted by supporting intervener, Shippers National Freight Claims Council. Replies opposing reconsideration were filed by certain respondents.

As above indicated, division 2, by order dated December 6, 1976, has reopened the proceeding for reconsideration on the present record. The record in this proceeding is fully described in our prior report and will not be repeated here.

DISCUSSION AND CONCLUSIONS

In our prior report, we recognized the ambiguity in the release rates provisions at issue;[2] yet, in order to avoid the possibility o discrimination through disparate payments to shippers for loss an damage, and so that we might harmonize the involved rates with th history and purpose of released rates as reflected in past decision interpreting somewhat similar provisions, we adopted a interpretation of the word "article" that comported more with i general usage than with its specific usage in those provision Because of the highly unusual circumstances surroundi publication of the provisions at issue and the absence of evidenc that the particular phraseology employed is currently used in oth publications, we have examined the provisions of all our outstandi released rates orders, and note that no such orders conta provisions precisely the same as those here involved. We are no therefore, satisfied that the scope of this proceeding is sufficien narrow to permit an interpretation of the word "article" th comports with its specific usage without risk of unlaw discrimination or any impairment of the history and purpose released rates.

As stated, this proceeding is limited to a very narrow issue— interpretation of the word "article" as specifically used in Releas Rates Order No. MC-342 dated August 13, 1952.[3] That or permits motor carriers to limit their common carrier liability to " cents per pound *for each article*" in a list of more than classification descriptions included in the National Motor Frei Classification. Our interpretation will determine whether carriers' liability for partial loss or damage should be fixed relating the 50 cents per pound limitation to: (a) the weight of commodity shipped; (b) the weight of the carton containing the or damaged portion of the commodity shipped; or (c) the weight of the smallest identifiable unit of the lost or damaged commodity shipped, such as a bottle. Interpretation (a) is the most favorable to the shippers; interpretation (c) is the most favorable to the carriers; both shippers and carriers oppose interpretation (b).

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[2] In our prior report, we admonished respondents to take greater care to use unambiguous in released rate tariffs in the future.

[3] Released Rates Order No. MC-342 and Released Rates Application No. MC-52 reproduced as appendix A hereto.

We conclude that, as used in Released Rates Order No. MC-342 and in the relevant items of the National Motor Freight Classification, the clause describing the released value of property as "50 cents per pound for each article" should be deemed to relate to the weight of each commodity in the shipment, and in event of loss or damage to a portion of the shipment, the amount recoverable should be the released value per pound multiplied by the gross shipping weight of each commodity involved, but not more than the loss or damage actually sustained. We make no conclusion as to the construction of similar limitation clauses which do not include the phrase "for each article" or as to the merits of applying the involved classification ratings upon a declaration of released value other than "50 cents per pound for each article." However, we recognize the need for further carrier and shipper discussion of released value rates and ratings, and offer the services of this agency to facilitate such discussions.

Our authority to approve motor carrier rates dependent upon and varying with declared or agreed values is set forth in section 210 of the act which makes applicable the provisions of section 20(11).[4] Section 20(11) empowers the Commission, insofar as released rates are concerned, to order departures from the normal common carrier liability for full loss and damage. Since such orders are clearly exceptions to the recognized general policy against any limitation of liability by a common carrier,[5] they should be clearly stated and must, under the statute, be "expressly authorized." However, since the section is silent on methodology, liability may be expressed in absolute or relative terms, and its limitation measured by the entire shipment and/or by any component thereof, whether in specific total amounts, fixed amounts per unit of weight, percentages of actual value per unit of weight, or upon some other basis. In short, although motor and rail common carriers have traditionally favored rates based on fixed released values per unit of weight, the Commission may authorize any form of released rates, provided only that, in its opinion, such rates are "just and reasonable under the circumstances surrounding the transportation."

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[4] Section 20(11) provides as follows:

> ***no contract, receipt, rule, regulation, or other limitation of any character whatsoever shall exempt such common carrier *** from the liability hereby imposed, and *** any common carrier *** delivering said property so received and transported shall be liable *** for the full actual loss, damage, or injury to such property caused by it *** and any such limitation, without respect to the manner or form in which it is sought to be made is hereby declared unlawful and void *** *Provided, however,* that the provisions hereof respecting liability for full actual loss, damage, or injury, notwithstanding any limitation of liability or recovery or representation or agreement or release as to value, and declaring any such limitation to be unlawful and void, shall not apply *** to property *** concerning which the carrier shall have been or shall hereafter be expressly authorized or required by order of the Interstate Commerce Commission to establish and maintain rates dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value of the property, in which case such declaration or agreement shall have no other effect than to limit liability and recovery to an amount not exceeding the value so declared or released *** and the Commission is hereby empowered to make such orders in cases where rates dependent upon and varying with declared or agreed values would, in its opinion, be just and reasonable under the circumstances and conditions surrounding the transportation.

In adopting a construction of the word "article" as used in our 1952 order in No. MC-342 and in related items of the National Motor Freight Classification, we have given consideration to the circumstances surrounding the transportation of the property involved, including the context in which the word was used in the application to which the order responds, the language used in exceptions and commodity tariffs naming released rates on the same list of commodities, and the possible impact of such a construction upon the carriers and members of the shipping public. We are also mindful of the well-established rule that all tariffs[6] are to be construed according to *their* language; that the intention of the framers, although important, is not necessarily controlling; that their terms should be so clearly stated as to avoid misrepresentation or misunderstanding; and that in case of ambiguity they must be construed against the maker. *Grain Products to Southern Territory*, 165 I.C.C. 23, 25 (1930).

The evidence shows that, in seeking authority to publish the released classification ratings at issue, the motor carriers were concerned about remaining competitive with the railroads which only a few weeks earlier had sought and obtained similar released rates authority. Some concern had also been expressed about the possibility of the catastrophic loss of an entire shipment, but no mention was made in either the rail or motor carrier applications of partial loss or damage. Released Rates Order No. 1104 of May 1, 1952, authorized the railroads to publish in their new Uniform Freight Classification ratings for various articles on the drug and chemical list based upon released valuations of "50 cents a pound for each article." Such order was rescinded by Released Rates Order No. 1113 of December 10, 1953, when the rail valuation clause in the relevant items of the Uniform Freight Classification was changed from "50 cents per pound for each article" to "50 cents per pound." On the other hand, no change has ever been made in the valuation clause set forth in Released Rates Order No. MC-342 or in the relevant items of the National Motor Freight Classification. Thus, there is a distinct difference between the liability provisions surrounding the transportation of property under released class rates via rail and those surrounding the transportation of property under released class rates via motor carriers. Moreover, whatever competitive need there might once have existed for maintaining identical liability provisions for rail and motor carriers, it has obviously long since ceased to be a classification factor of any real significance.

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[5] The very purpose of the second Cummins amendment—now incorporated into section 20(11)—was to:

> * * * restore the law of full liability as it existed prior to the Carmack amendment of 1906, so that when property is lost or damaged in the course of transportation under circumstances as to make the carrier liable, recovery is had for full value or on the basis of full value. [Senate Committee on Interstate Commerce, Report No. 394 64th Congress, 1st Session] [*Gold Hunter Mining Co. v. Director General*, 63 I.C.C. 234]

[6] The rule of construction applies to governing tariffs such as the National Motor Freight Classification.

The evidence also establishes that the released value ratings as published were the same as the then-existing nonreleased, full-liability ratings on the same list of commodities which were published in exceptions and commodity tariffs applicable throughout major freight rate territories. Thus, in many instances the only result of publication of the released ratings in the National Motor Freight Classification was a reduction in the liability of the carriers with no corresponding reduction in rates to the shippers. Beyond that there was little, if any, change in the circumstances surrounding the actual transportation of articles on the drugs and chemicals list brought about by the released value ratings. The pected benefit to the shipper, i.e., the consideration supporting the limitation of liability, was the assurance that it could continue to move its products at the same rating as under full-liability rates in event the carriers discontinued all their exceptions tariffs as contemplated in docket No. 28310, *Class Rate Investigation, 1939*, 262 I.C.C. 447 (1945), a development then generally assumed to be relatively imminent. Such an assumption has not proved to be completely accurate, for although the railroads have sharply reduced the use of exceptions tariffs, the motor carrier respondents continue to use them to a significant degree. Although the foregoing circumstances do not act to nullify the agreed ratings involved, they are factors to be considered with others in determining which possible construction of the provisions at issue would be most consistent with the quality of consideration that supports the departure from normal common carrier liability.

Another important factor in construing the provisions at issue is the context in which the word "article" was used in the application, order, and relevant items of the National Motor Freight Classification. We agree with petitioner that in both the application and order the word "article" is used to denote a commodity classification description, a construction recognized (though not adopted) in our prior report. The application seeks authority to publish agreed valuation ratings on "articles named below," then lists under the caption "Articles" more than 100 separate classification commodity descriptions, the valuation declaration at issue ("50 cents per pound for each article"), and a provision for nonapplication of the ratings where lower charges result by applying provisions in individual descriptions for such "articles"; on the very next line the carriers explain in justification of the proposed ratings that "the various commodities" listed in the application have a wide range of values. Clearly, such a usage of "article" equates it with the word "commodity." Such a usage is completely consistent with that in the classification itself which, throughout its many pages, employs the word "article" in precisely the same manner. Moreover, as applied to normally expected shipping situations such a construction would be in order. Considering the fact that the list of articles consists of many separate descriptions of commodities that could be included in the same shipment—with each other or with commodities moving under nonreleased, full-liability rates—it would be natural to declare valuations on the basis of the articles involved.[7]

Since we have concluded that "article" was specifically used to denote "commodity" we will substitute the latter for the former

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[7] For example, if a shipment of 660 lb is made up of 100 lb of acids moving under nonreleased rates, and 10 lb of capsules, 50 lb of chemicals, and 500 lb of drugs moving under released rates, the carriers' liability—whether for full or partial damage—would be subject to the following limitations:

Article or commodity	Amount
Acids	No limit
Capsules (10 x 50¢)	$5
Chemicals (50 x 50¢)	25
Drugs (500 x 50¢)	250

word when comparing the valuation clause at issue with those discussed in other proceedings in which the word "article," if used at all, would have been used in an entirely different context. However, having determined that as used in Released Rates Order No. MC-342, the word "article" is synonymous with "commodity," there remains to be determined the extent to which the valuation clause of "50 cents per pound for each 'commodity'" affects the carriers' liability for loss or damage to property transported.

Respondents argue that it makes no difference how "article" is defined since legal precedent has established that there is no right to recovery of actual damages up to an arbitrary maximum valuation based on total shipment weight, citing *Western Transit Co.* v. *A. C. Leslie & Co.*, 242 U.S. 448 (1917), *Metals or Metal Alloys*, 311 I.C.C. 617 (1960), *Goldstein & Leavy, Inc.*, v. *Arrow Carrier Corp.*, 53 M.C.C. 9, 14 (1951), and *Adeline Apparel Shops, Inc.*, v. *Savage Truck Lines, Inc.*, 63 M.C.C. 369 (1955). We do not agree that legal precedent obviates the need for definition of the word "article" as used herein. The fact that the form of valuation clause involved in the cited cases was insufficient to permit recovery of actual damages up to an arbitrary limit[8] does not establish the precedent that all released rates provisions prevent recovery of actual damages up to a maximum measured by the total weight of the commodity shipped. The extent of recovery authorized depends upon the particular valuation clause need,[9] for as previously stated, section 20(11) does not prevent the measurement of liability by the weight of the entire shipment and/or any component thereof as long as the rates are reasonable. In the cited cases, the valuations, all of the same basic form, were expressed as: "not to exceed $100.00 per ton" (*Western Transit* case), "not exceeding 50 cents per pound actual weight" (*Goldstein & Leavy* and *Aldeline Apparel* cases), and "not exceeding 40 cents per pound" (*Metals or Metal Alloys* case); they included no language whereby the limitation of liability might conceivably be measured by some component other than the weight of the lost or damaged portion. Here, however, the valuation clause includes language not present in any of the cited cases—language capable of being construed so as to signify a component other than the lost or damaged portion by which the limitation of liability might be measured. Such language may not be disregarded, for it is an elementary rule of contract construction that effect be given, if possible, to every word, clause, or sentence. *Pillsbury Flour Co.* v. *Great Northern R.R.*, 25 F. 2d 66, 69 (1928). Consequently, as indicated in our prior report, it does make a significant difference as to how "article" is defined.

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[8] A summary of cases cited herein appears as appendix B hereto.

[9] As we stated in *Adeline Apparel Shops*, *supra*:

> There are various methods under which damages are computed, and the specific amount to be awarded depends upon the type of shipment, the commodity, the extent of the loss or injury, and the relation or proportion that the released value bears to the actual value of the entire shipment, among other factors.

It is appropriate to comment at this point on the related statement in our prior report that the valuation of the property transported is not meant to set an absolute limit of liability but rather a ratio of loss to recovery by the shipper.[10] Such a statement does in fact appear in *Western Transit Co.* v. *Leslie & Co., supra,* at 454. However, the full statement reads as follows:

> The "released" or agreed valuation is $100 per net ton. There were 25 tons in this shipment. It is insisted that as the 25 tons constituted a single lot, $2,500 is recoverable for loss of or damage to the whole or to any part of the lot. This construction does violence to the language used and is unreasonable. The valuation clause fixes not an arbitrary limit of recovery, but a ratio.

It is apparent from the foregoing that the court was referring to the particular clause it had been called upon to construe. Although substantially similar clauses have been widely used in rail and motor carrier released rates provisions, it does not follow that other valuation clauses may not be so worded as to produce results which differ from those reached in *Western Transit*. We did not discuss such a possibility in our prior report; neither did we discuss the wording of valuation clauses used in connection with released rates on identical commodities published in motor carrier exceptions and commodity tariffs.

Released Rates Order No. MC-359 of March 29, 1954, authorizes parties to the National Motor Freight Classification to establish and maintain truckload and volume commodity rates on the same list of items as embraced herein. Additionally, various other released rates orders[11] authorize certain motor carrier tariff publishing agencies to establish and maintain less-than-truckload commodity rates on the same list of items. All of these orders provide that the commodity rates will be based on an agreed valuation of "50 cents per pound"

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[10] Were we to conclude that the valuation clause approved by us in 1952 fixed a ratio of loss to recovery, we would out of a sense of fairness be forced to point out that the carriers have completely disregarded that ratio over the years by failing to make any adjustment whatsoever in the recovery factor in order to coincide with the substantial changes in the loss factor brought about by the increasing commodity prices and freight rates.

[11] Released rates orders No. MC-684 of September 26, 1966, No. MC-703 of June 28, 1967, and No. MC-734 of June 6, 1968.

(they omit the phrase "for each article" as set forth in our basic order in No. MC-342), and in addition authorize recovery of actual value of the lost or damaged portion up to the released value of the package.[12] Therefore, to adopt the position in this case that the limitation of motor carrier liability should be measured by the weight of the smallest unit lost or damaged would produce an anomalous situation in which the limit of liability on the identical commodities would be set at a lower level when moving under class rates than when moving under commodity rates. Stated otherwise, the shipper who moves at higher rates would recover less than the shipper who moves at lower rates. Athough such a preposterous result would not have been possible had the liability provisions of the Classification been modified so as to coincide with those of commodity tariffs, or *vice versa,* the fact remains that respondent motor carriers have not seen fit to seek authority to modify the Classification or Released Rates Order No. MC-342. We must, therefore, consider the language of the order as it is, not as it might have been. Such language makes no provision whatsoever for measuring the limit of liability by the weight of the package; yet, as indicated previously, it may be construed so as to permit measurement of the limit of liability by the weight of the commodity shipped. Such a construction is the only one that recognizes the distinction between class rates and commodity rates while observing the basic principle underlying released rates that reductions in liability and reductions in rates should go hand in hand.

We believe that an interpretation relating the valuation at issue to the weight of each commodity in the shipment gives proper recognition to the needs and rights of members of the shipping public without placing the motor carriers in any real financial jeopardy. Regardless of their individual claims policies, respondent motor carriers would continue to be protected against the catastrophic loss of an entire shipment, as heretofore. Thus, the extent to which they would be affected would be determined by the degree to which their present policy with respect to partial loss and damage claims is inconsistent with our interpretation of the shipper's right of recovery. There is no evidence as to the frequency or level of claims paid by the motor carrier industry for the loss or

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All orders relating to released value commodity rates provide:

> In case of loss or damage to a portion of the contents of a shipping package, the amount recoverable will be the released value per pound multipled by the weight of the package, but not more than the actual loss or damage.

damage of the commodities here involved. Although spokesmen for several of respondents' motor carrier members indicated that claims for partial loss or damage were settled on the basis of weight lost times the unit valuation, no supporting evidence was presented. On the other hand, petitioner established by competent evidence that some of respondents' members settle claims for partial loss or damage on the basis of the total weight shipped times the unit valuation. The fact that those particular carriers are able to honor claims on a basis favorable to shippers without noticeable financial impact demonstrates that other carriers should be able to pursue the same policy with respect to the commodities at issue without any fear of financial jeopardy. Moreover, as the parties are no doubt acutely aware, there has been no change whatsoever in the level of the released valuations since they were first established in 1952. In other words, although the actual value of these commodities and the freight rates charged by respondents for their transportation may have more than doubled, members of the shipping public may today recover no greater amount for lost or damaged items than they were able to recover a quarter of a century ago. Considering the steadily declining value of the dollar, the carriers' liability under these released rates may eventually become so nominal as to become almost meaningless.

In our prior report, we indicated concern about the possibility of discrimination in the form of disparate payments to shippers for loss and damage. The thrust of that concern was directed to the type of disparity that could result from the conclusion of the review board that the valuation clause at issue should be construed so that liability would be determined on a packing-case basis. As previously stated, a review of our released rates orders indicates that many of them include conditions which provide that in case of partial loss or damage the limit of liability shall be measured by the weight of the packing case or container. Although such conditions are not included in the order at issue, we have in the past approved their use when warranted by the circumstances and conditions surrounding the particular traffic. *Metals or Metal Alloys, supra,* 618. While we continue to recognize the possibility of disparate payments for loss and damage due to the fact that shippers may not all use the same size of container for the same item, we are convinced that such disparity would not constitute the sort of discrimination proscribed by the act. We are likewise convinced that disparity in loss and damage payments due to the fact that some shippers ship more or less of the same commodity than others would not constitute unjust discrimination. Consequently, we see no reason to be concerned about any potential discrimination in a valuation clause that measures the limit of liability by the weight of the commodity shipped. The only remaining discrimination—that resulting from applying different interpretations of the valuation clause at issue—should be corrected by our order herein.

We again remind all parties that our decision is strictly limited to defining the phrase "for each article" in connection with the publication of released value classification ratings on drugs, chemicals, medicines, toilet preparations, and other related articles, pursuant to authority granted in Released Rates Order No. MC-342. We recognize that the definition we have adopted will result in a somewhat different basis for the settlement of partial loss and damage claims than has been observed by many of the respondents. However, we also recognize that the entire subject of released rates has not come under joint review by carriers and shippers for many years, and that within that time the provisions of many such rates may have become distorted by changes in circumstances and conditions surrounding the particular traffic involved. Accordingly, we encourage respondents to initiate joint informal discussions among members of the particular industry groups utilizing released rates—including those based on the ratings here in issue—with the view of making them more responsive to the actual claims experience of the carriers and to the changing requirements of the shipping public.[13]

We find, That the term "article" in the phrase "not exceeding 50 cents per pound for each article" means each commodity in a shipment of drugs, chemicals, medicines, toilet preparations, or other related commodities.

We further find, That in event of loss or damage to a portion of the shipment, the amount recoverable should be the released value of 50 cents per pound multipled by the gross shipping weight of each commodity involved, but not more than the loss or damage actually sustained.

We further find, That the findings of our prior report are modified to the extent they are inconsistent with those set forth herein.

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[13] Such discussions might include consideration, among other matters, the following questions: (1) Should a distinction be made between "declared and agreed" rates? (2) Are released rates, especially those based on fixed monetary valuations, a proper element of freight classification, or should such rates be limited to publication in commodity tariffs? (3) since the statutory authority provides for released rates that vary with valuation, should not such rates provide for the level of the valuation to change with the level of the rate? (4) Should released rates orders be made subject to expiration dates so that the limit of liability may be periodically reviewed in light of changing values and consumer requirements? (5) Why is the agreed value expressed as a fixed amount per unit of weight rather than as a fixed percentage of invoice or actual value per unit of weight? Might it not be related to a commodity or rate index that would change annually?

And we further find, That this decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

COMMISSIONER HARDIN, dissenting:

I am not convinced from the record presented in this proceeding that the term "for each article" can be interpreted as being synonymous with "commodity." I believe that the correct interpretation is "per container or case."

It is ordered, That this proceeding be, and it is hereby, discontinued.

APPENDIX A

INTERSTATE COMMERCE COMMISSION

RELEASED RATES ORDER NO. MC-342

IN THE MATTER OF APPLICATIONS NOS. MC-524 AS AMENDED, AND MC-525 AS AMENDED, UNDER
SECTIONS 20(11), 219, and 413 OF THE INTERSTATE COMMERCE ACT, AS AMENDED

PRESENT: J. Haden Alldredge, Chairman, to whom the above-entitled matter has been assigned for action thereon.

The Commission having been petitioned for and on behalf of carriers and freight forwarders parties to the National Motor Freight Classifications, Nos. 11, MF-I.C.C. No. 1, I.C.C. No 1 and I.C.C. FF No. 1, and National Motor Freight Classification No. A-1, MF-I.C.C. No. 3, American Trucking Associations, Inc., Agent, for authority to establish and maintain ratings for the interstate and foreign transportation of drugs, medicines, toilet preparations, essential oils, and other articles as described in Released Rates Applications Nos. MC-524, as amended, and MC-525, as amended, dependent upon the released value of the property, and the applications having been considered and good cause therefor appearing:

It is ordered, That all common carriers by rail or motor vehicle and freight forwarders who are now, or may hereafter become, parties to said National Motor Freight Classification No. 11, and National Motor Freight Classification No. A-1, supplements thereto or reissues thereof, be, and they are hereby authorized to establish and maintain by filing and posting in the manner prescribed in the Interstate Commerce Act, ratings in said Classifications for the interstate and foreign transportation of articles described in the said applications, dependent upon value declared in writing by the shipper, or agreed upon in writing as the released value of the property, as specified in the said applications, subject to the condition that on the drugs, medicines, toilet preparations and other articles described in Released Rates Application No. MC-525, as amended, the released value stated by the shipper shall be void as an agreement limiting the carriers or freight forwarders liability unless supported by a consideration in the form of a reduced charge for transportation.

It is further ordered, That in the publication of "Note 1", proposed in connection with the drugs, medicines, toilet preparations and other articles, provisions will be included as follows:

Subject to the condition that the released value stated by the shipper shall be void as an agreement limiting the carriers or freight forwarders liability unless supported by a consideration in the form of a reduced charge for transportation.

It is further ordered, That changes may be made in any rating, minimum weight, or packing specification established under the authority of this order, but the commodity description may not be broadened to embrace other commodities or articles, nor may any change be made in the released value upon which the ratings are dependent, without specific authority of the Commission.

And it is further ordered, That the Classifications containing released ratings filed under the authority of this order shall show, in connection with such ratings, a notation substantially as follows:

The released values upon which the ratings provided in Item No. are dependent have been authorized by the Interstate Commerce Commission by Released Rates Order No. MC-342 of August 13, 1952, subject to complaint or suspension.

The Commission does not approve the lawfulness, except under Sections 20(11), 219 and 413 of the Interstate Commerce Act, of any rating that may be filed under authority of this order.

June 9, 1952
File: 121-9

To the Interstate Commerce Commission
Washington 25, D. C.

Application No. 14

For Authority to Publish Ratings on Essential Oils Based on Agreed or Released Value

The Carriers named in National Motor Freight Classification No. A-1, MF-ICC No. 3 and National Motor Freight Classification No. 11, MF-ICC No. 1, ICC No. 1, ICC-FF No. 1, American Trucking Associations, Inc., Agent, F. G. Freund, Issuing Officer.

do hereby respectfully petition the Interstate Commerce Commission that authorization be granted under Sections 20(11), 219 and 413 of the Interstate Commerce Act, and as amended, to establish and maintain ratings for the transportation of property dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value of the property on the following:

Item No.	Description	LTL	TL	Min Wt Factor
	OILS, NOT NAMED IN OTHER MORE SPECIFIC GROUPS:			
72690-A	Essential, Natural or Artificial, NOI, value declared in writing by the shipper or agreed upon in writing as the released value of the property in accordance with the following, see Note, in barrels or boxed or in jacketed metal cans in crates, or in copper drums:			
	If not exceeding 50 cents per pound	70	40	30.6
	If exceeding 50 cents but not exceeding $1.00 per pound	100	70	24.6
	If exceeding $1.00, but not exceeding $2.50 per pound	200	150	24.6
	If exceeding $2.50, but not exceeding $5.00 per pound	300	250	24.6
	If exceeding $5.00, but not exceeding $7.50 per pound	400	350	24.6
	If exceeding $7.50 per pound or if in carboys: Not taken			

It has been shown that essential oils have a wide range of values. Among these are Cajeput, with values ranging from $2.10 to $2.70 per pound. Cedar leaf, from $2.25 to $3.50 per pound; Cedarwood, from $.55 cents to 65 cents per pound; Eucalyptus, from $1.00 to $1.50 per pound; Lemon, from $5.65 to $8.20 per pound; Orange, from $1.80 to $5.85 per pound, with sesquiderpeneless orange oil having values ranging from $175.00 to $180.00 per pound; peppermint, from $7.25 to $8.30 per pound. These values were taken from Oil, Paint and Drug Reporter, issue of May 26, 1952.

The primary purpose of this application is to enable Motor Carriers to publish in their new National Motor Freight Classification No. A-1 uniform ratings and provisions on a competitive basis the same as published by the rails in their Uniform Freight Classification No. 1. The same provisions as here proposed are incorporated in the Twentieth Section Application No. 1438 of the rails' Uniform Classification Committee filed with the Commission November 15, 1951, and as amended March 19, 1952. Publication has been accomplished in item 34235-A, Supplement No. 2 to Uniform Freight Classification No. 1, under authorization of Released Rates Order No. 1104 of May 1, 1952.

Present provisions on which this authorization is requested are now published in item 72690 of National Motor Freight Classification No. 11. Prior to the rail publication of new provisions based upon released values, as set forth above, Motor Carriers were on a competitive basis with the rail lines on this class of traffic. If this authority is granted item as above cited will be canceled and superceded by the contemplated new publication.

The primary purpose of the application is to enable Motor Carriers to publish in their New National Motor Freight Classification No. A-1 uniform ratings and provisions on a competitive basis the same as the rails have published in their Uniform Freight Classification No. 1.

Motor Carriers justification for this petition rest solely upon the competitive factor involved, and if authorization is granted by the Commission such authorization would follow the same logic and reasoning of the Commission in granting Motor Carriers Section 219 relief as contained in the Commission's Released Rates Order MC No. 1 of January 16, 1936. Motor Carriers are confronted with the same problem as the rails in transporting Essential Oils.

WHEREFORE, in order that the above set forth provisions may be published in lieu of those presently applicable it is respectfully requested that your honorable Commission issue an order granting permission to publish the aforementioned provisions in both National Motor Freight Classifications.

Respectfully submitted,
AMERICAN TRUCKING ASSOCIATIONS, INC., AGENT

F. G. Freund, Issuing Officer
NATIONAL MOTOR FREIGHT CLASSIFICATIONS

June 9, 1972
File: 121-9

To the Interstate Commerce Commission
Washington 25, D. C.

Application No. 15
For Authority to Publish Ratings on Drugs, Chemicals, Medicines, etc., Based on Agreed or Released Value

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The carriers named in National Motor Freight Classification No. A-1, MF-I.C.C. No. 3 and National Motor Freight Classification No. 11, MF-I.C.C. No. 1, I. C. C. No. 1 and I. C. C. FF No. 1, American Trucking Associations, Inc., Agent, F. G. Freund, Issuing Officer, do hereby respectfully petition the Interstate Commerce Commission that authorization be issued under Sections 20(11), 219 and 413 of the Interstate Commerce Act, and as amended, to establish and maintain ratings for the transportation of property dependent upon the agreed or declared value being stated on the following:

Item No.	Description	LTL	Vol.	Min wt.
33465	Drugs, chemicals, medicines, toilet preparations and other articles named below, value declared in writing by the shipper, or agreed upon in writing as the released value of the property, not exceeding 50 cents per pound, see Notes 1 and 2, items and , viz:			

Articles	As shown in items
Acids	110 to 460 incl.
Albumen, blood	2970
Alginates, ammonium or sodium, dry	3020

Articles—Continued	As shown in items
Anti-freezing compound, NOI	4220
Antimony sulphide, concentrated ore (needle antimony), pulverized or powered (black sulphide, not purified), in barrels or boxes	26270
Arsenic, metallic	68460
Balsam crude, NOI	8190
Bananas, powered	41580
Barks, NOI	8250 and 8260
Barks, slippery elm or soap	8320
Beans, Honey (St. Johns Bread)	9210
Beans, Tonka	39330
Beans, vanilla or tahiti	39340
Berries, juniper or sloe, dried	9350
Berries, palmetto	9360
Beverage preparations, NOI, dry	39380
Bismuth metal	68490
Blue, Ultramarine	74750
Bluing, Laundry, dry	9850
Brushes, tooth, in boxes	14580
Calcium, metallic	68540
Capsules, gelatine	19500
Cellulose, NOI	20630
Cellulose, woodpulp, NOI	20630
Charcoal, other than animal or wood, NOI not activated	21240
Charcoal, wood, NOI, not activated	21250
Chemicals	(21320 to 22140, incl (22160 to 22880, incl (22910 to 23080, incl (23100 to 23170, incl (23190 to 24040, incl (24100 to 25800, incl
Cochineal	28080
Coffee, extract of (condensed coffee)	39550 & 39560
Color, butter	28220 & 28230
Color, cheese	28240
Confectioners, colorings	29890
Deer Tongue	39080
Dental impression compound	32040
Dextrine or British gum, dry	32280
Deodrants or disinfectants, NOI	32240
Drugs	32900 to 33460, incl
Dye, soap	33600
Dye stuffs, NOI	33610
Egg Albumen	31550
Embalming fluid	35260
Extracts, fustic or logwood, dry	35600
Extracts, malt or maltose (malt sugar)	40280 & 40290
Extracts, meat, with or without admixture or vegetable extracts including boullion cubes and soup tablets	39660
Extracts, sumac	35640
Figs, powdered	41640

Articles—Continued	As shown in items
Fireproofing compounds, liquid, NOI	38130
Flour bleaching compound, NOI	39010
Flowers, herbs or leaves, dried, NOI	39090 & 39100
Food curing, emulsifying, preserving or seasoning compounds, NOI	39900
Food, prepared, NOI	39880
Foot warmer or hot bottle charges, chemical	41190
Fruit juice powders or crystals, citrus	40000
Gelatine sheets, transparent	45830
Ginger roots, dry, not ground nor powdered	83800
Ginger roots, ground or powdered	83790
Grease, lanolin	47950
Gums	48020 to 48260, incl.
Gutta-percha	48400
Hoof dressing or animal ointment	52250
Insecticides, insect repellants or vermin exterminators, NOI, other than agricultural insecticides	53270
Licorice (licorice extract)	19220, 57140, 57150
Licorice roots, ground or powdered, other than spent	83820
Licorice roots not ground nor powdered	83830
Manganese-titanium	3210
Medicines	32900 to 33460 incl.
Milk food, other than malted milk, other than liquid	40390
Mordants, NOI	69850
Nutmegs	83840
Oil, aniline	72550
Oil, apricot or peach kernal	72560
Oil, camphor	72580
Oil, castor, NOI	72610
Oil, cod liver	37180
Oil, fish liver, edible or medicinal, NOI	72720
Oil, pine	72920
Peaches, powdered	41700
Pepper	83860
Prunes, powdered	41760
Psyllium seed hulls	80220
Pyroxylin solutions, NOI (liquid or jelly pyroxylin collodion)	80310
Quassia chips	80410
Quassia wood, powdered	80420
Quicksilver (metallic mercury)	68810
Refrigerator air purifier or deodorizer	83080
Rennet extract	83095 & 83100
Roots, NOI	83870 & 83880
Rubber accelerators or softerners, NOI	84040
Rum, denatured	84410
Scrap, cadmium, NOI	68830
Seeds, cardamon	84770
Seeds, flower or garden, NOI	84900

Articles—Continued	As shown in items
Seeds, NOI	85120
Seeds, Psylium (Fleaseed)	85080
Sodium metallic	68930
Spermaceti	87050
Spices, NOI	83920
Starch, arrowroot	87670
Sugar of milk, refined	33420
Sumac leaves	88280
Toilet preparations	See Item, Drugs
Vegetable roots, NOI, not ground nor powdered	83940
Wax, bees'	96520
Wax, candelilla	96530
Wax, carnauba	96550
Wax, Japan	96590
Wax, Laundry compound	96600
Wax, montan	96610
Wax, vegetable, NOI	96660
Yeast	41170 & 41180

Item No.	Description	LTL	Vol	Min. wt
	In packages (except carboys not complying with specifications of the American Trucking Associations, Inc., Agent, Tariff No. 7, MF-I.C.C. No. 2, I.C.C. No. 2, I.C.C. F.F.-No. 2, or successive reissues thereof) provided for LTL or TL shipments, as the case may be, in separate descriptions for articles; also TL, in tank trucks, Rule 23, as provided for in separate descriptions for articles	70	40	30.6
33466	Note 1 - The value declared in writing by the shipper or agreed upon in writing as the released value of the property, as the case may be, must be entered on shipping order and bill of lading as follow: "The agreed or declared value of the property is hereby specifically stated by the shipper to be not exceeding 50 cents per pound for each article." Authority to maintain ratings based on released value has been applied for under Application No. to the Interstate Commerce Commission.			
33467	Note 2 - Ratings named in item 33465, will not apply if consignor fails or declines to declare value or agree to release value in writing in accordance with Note 1, item 33466, nor if lower charges would result from the application of provisions in individual descriptions for articles.			

It is a matter of record that the various commodities included in this application have a wide range in values. The following are cited as typical examples of the values involved:

Albumen, blood 70 cents to 80 cents per pound; Bismuth Metal, $2.25 per pound; Alcohols, NOI, 11 cents to $4.00 per pound; Aldrin, 93 cents to $1.05 per pound; Benzine Hexachloride, up to $7.00 per pound; Pepper, white, $1.75 per pound; Pepper, black, $1.13 to $1.33 per pound; Dyes or colors, coal tar, other than indiago

[sic]. Drugs or Cosmetics, $2.25 to $35.90, other than Drugs or Cosmetics, 47 cents to $4.33 per pound. These values are taken from the Oil, Paint and Drug Reporter of May 26, 1952. Flower or Garden Seeds, NOI, have values ranging from 9 cents to $8.00 per pound, the latter being Cauliflower Seed. Tomato Seeds have value of about $1.25 per pound.

This subject appeared on the National Classification Board's Docket 53 as Subject 86, a Board proposal to establish in the National Motor Freight Classification comparable provisions, on a competitive basis, with those concurrently published by the rail lines in items 15502-A Supplement No. 2 to their New Uniform Freight Classification No. 1. Proposal was approved by the Board on May 27, 1952. The recommended disposition of the Board is fully set forth in an appendix to this application.

Public hearings conducted by the Board developed favorable reaction from shippers and carriers alike and evidenced a desire that Motor Carriers should be competitive on this class of traffic.

Motor Carriers justification for this petition rest solely upon the competitive factor involved, and if authorization is granted by the Commission such authorization would follow the same logic and reasoning of the Commission in granting Motor Carriers Section 219 relief as contained in the Commission's Released Rates Order MC No. 1 of January 16, 1936. Motor Carriers are confronted with the same problem as the rails in transporting the various commodities included in this application.

WHEREFORE, in order that the above set forth provisions may be published in lieu of those presently applicable it is respectfully requested that your honorable Commission issue an order granting permission to publish the aforementioned provisions in the National Motor Freight Classifications.

Respectfully submitted,
AMERICAN TRUCKING ASSOCIATIONS, INC.
AGENT

F. G. Freund, Issuing Officer
NATIONAL MOTOR FREIGHT CLASSIFICATION

APPENDIX B

Summaries of cases which involve the interpretation of valuation clauses

Western Transit Co. v. A. C. Leslie & Co., 242 U.S. 448 (1917), involved rates on copper ingots released to a value not to exceed "$100.00 per ton" shipped on a bill of lading stating that the shipper "agrees to the specified valuation in case of loss or damage *** because of the lower rate thereby accorded for transportation". One ton of a 25-ton shipment was stolen and the shipper insisted that since the 25 tons constituted a single lot, $2,500 was recoverable for loss or damage to the whole or any part of the lot. The Court held that the shipper was entitled to recover not more than $100 a ton for each or any ton damaged or lost because the particular valuation clause fixed "not an arbitrary limit of recovery, but a ratio."

Goldstein & Leavy, Inc., v. Arrow Carrier Corp., 53 M.C.C. 9 (1951), involved an application for authority to establish rates on unfinished rayon piece goods when released to a value not exceeding "50 cents per pound actual weight" on shipments in excess of 100 pounds. The application had provided that the carrier's liability on shipments over 100 pounds would be limited to "50 cents per pound actual weight of the lost or damaged portion." The related released rates order (No. MC-208) authorized released rates "as specified in the application" without spelling out that recovery would be limited to the actual weight of the lost or damaged portion. The Commission, Division 1, said that its failure to specifically prescribe the exact language to be used could not be construed as creating any greater liability than was contemplated in the application, and found that recovery should be limited to the agreed valuation multiplied by the weight of the lost or damaged portion.

Adeline Apparel Shops, Inc. v. Savage Truck Lines, Inc., 63 M.C.C. 369 (1955) involved rates on clothing and dry goods when released to a value of "not exceeding $50 for any shipment of 100 pounds or less, or not exceeding 50 cents per pound actual weight for any shipment in excess of 100 pounds." The complainant contended that where there was partial loss of a shipment in excess of 100 pounds the carrier's liability should be for the actual value of the loss up to $50.00. The Commission disagreed, adopting the finding of an examiner that the involved provisions did not appear to be ambiguous or indefinite, and since the shipment was in excess of 100 pounds the limitation was, as clearly stated, "50 cents per pound actual weight."

Metals or Metal Alloys, 311 I.C.C. 617 (1960), involved applications for authority to establish ratings on certain new super metals and alloys used in the atomic energy, military, space, and other programs when released to a value not exceeding "40 cents per pound." (Other ratings, also expressed on a "per-pound" basis were provided.) However, unlike he applications which specified that there should be no partial recovery clause, the related released rates orders (Nos. MC-439 and 1185) provided for the ratings to be made subject to a partial-recovery clause permitting recovery for loss or damage up to the gross weight of the package. Evidence developed at a subsequent hearing on the matter showed that the released value ratings had been developed by the carriers in cooperation with the industry, that all shippers participating in negotiations had understood and agreed that the ratings would not be subject to a partial-recovery clause, and that if required to include such a clause the involved carriers would seek to increase or cancel the ratings. The Commission, Division 2, held that such surrounding circumstances did not warrant the imposition of a partial-recovery clause, and ordered its elimination.

NO. 36337

CONTINENTAL OIL COMPANY v. SOUTHERN PACIFIC TRANSPORTATION COMPANY, ET AL.

Decided March 23, 1977

Rates charged on ethylene glycol, in carloads, from West Lake Charles, La., to Omaha, Nebr., found to have been inapplicable. Assailed combination rates found to have been applicable but unreasonable to the extent they exceed the single-factor rates. Waiver of collection of undercharges authorized on 53 shipments.

Thomas F. McFarland, Jr., D. S. Smith, and *Harold E. Spencer* for complainant.

L. T. Duerinck, Harry B. LaTourette, W. R. Power, R. H. Stahlheber, and *D. L. Turkal* for defendants.

REPORT AND ORDER OF THE COMMISSION

DIVISION 2, COMMISSIONERS HARDIN, O'NEAL, AND CHRISTIAN

BY THE DIVISION:

The modified procedure was followed. Exceptions to the initial decision of the Administrative Law Judge were filed by defendants, Southern Pacific Transportation Company, et al.,[1] including an additional verified statement. A petition for the taking of official notice of the judicial proceedings instituted by defendants for the collection of the involved undercharges, or, in the alternative reopening the record for receipt of supplemental testimony attesting to the institution of the judicial proceeding, and exceptions to the initial decision were filed by complainant on a contingent basis. No replies were filed.

Complainant's petition was filed to correct the Administrative Law Judge's assumption that the statute of limitations had run preventing determination of the reasonableness of the rates and charges in question. The petition shows that on April 20, 1976, Southern Pacific Transportation Company filed an action in the

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[1] Burlington Northern, Inc., Chicago and North Western Transportation Co., Missouri Pacific Railroad Company, and St. Louis-San Francisco Railway Company.

District Court of Harris County, Tex., 165th Judicial District, No. 1072066, *Southern Pacific Transportation Company* v. *Continental Oil Company*, for the collection of the alleged undercharges. By order dated May 10, 1976, the action was stayed pending determination by this Commission of the lawfulness of the freight charges.[2] We may take official notice of public documents. The petition is granted. *Loading Rules, Cantaloups*, 297 I.C.C. 621, 622 (1956).

Our ultimate findings are the same as those of the Administrative Law Judge but for different reasons. Exceptions and requested findings not specifically discussed in this report or reflected in our findings or conclusions have been considered and found not justified or not necessary for the proper resolution of this proceeding.

There is no dispute over the facts, and the statement of facts by the Administrative Law Judge, being accurate in all material respects is, except as modified or supplemented herein, affirmed and adopted as our own. Accordingly, the facts will be restated only insofar as necessary for a proper understanding of the issues.

By complaint filed March 3, 1976, Continental Oil Company alleges that undercharges[3] sought to be collected by defendants on 53 shipments of ethylene glycol from West Lake Charles, La., to Omaha, Nebr., during the period May 3, 1973, through October 12, 1973, inclusive, are unjust and unreasonable in violation of section 1(5) of the Interstate Commerce Act. The shipments involved in this proceeding are not susceptible to handling by Special Docket Procedures because they occurred more than 2 years before the expiration of the statutory period provided by section 16(3)(b) of the act. Complainant seeks an order requiring defendants to cease and desist the unlawful practices and authorizing defendants to waive collection of the undercharges in the amount of $40,896.04.

For many years complainant has been shipping ethylene glycol from its plant at West Lake Charles to Omaha under a rate specified in item 4320 series of Southwestern Freight Bureau Tariff 210 series. Through inadvertence or oversight in tariff publication, the rate complainant had been using was canceled and replaced with a significantly higher combination rate. For the purposes of clarity, we will refer to the rate basis on which complainant paid charges as the "sought rate" and the rate basis on which defendants filed for undercharges in the court proceeding as the "assailed combination rate."

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[2] The judicial action referred to above was instituted within 3 years after the date of the earliest of the shipments involved in that action and the involved complaint. However, the complaint in the instant proceeding was filed prior to institution of the court action. On June 24, 1976, within 90 days after the institution of the judicial action, complainant refiled the complaint in the instant proceeding making specific reference in paragraph 7 thereof to the filing of the judicial action. The contents of that paragraph were not in the original complaint. The subsequent complaint was received by the Commission but neither given a separate docket number nor made a part of the formal record in the instant proceeding when the Administrative Law Judge issued the initial decision. The supplemental verified statement attests to the facts set out in paragraph 7.

[3] Defendants originally presented complainant balance-due freight bills on the involved shipments amounting to $43,814.92, which were subsequently reduced to $42,792.34. Complainant requests waiver of undercharges of $40,896.04 conceding that it owes defendants an additional $1,896.30 because of a billing error.

The following is a general synopsis of the facts surrounding the controversy. In item 4320-B of Southwestern Freight Bureau (SWL) Tariff 210-J, ICC 4867, rates applied on "Glycols: Diethylene or ethylene." In item 4320-C of that same tariff, "Glycols: *** diethylene, ethylene or mixtures thereof" was added to apply only in connection with the new column 2 rate to St. Joseph, Mo., for "jumbo" tank cars by reference to note 11. Column 1 rates continued to apply on diethylene or ethylene glycol. In item 4320 of SWL Tariff 210-K, ICC 4993, effective January 28, 1972, through compiler error, or oversight, "note 11" was added to the description "Glycols: Diethylene or ethylene." Note 11 restricted those commodities to apply only in connection with column 2 rates, thereby eliminating application of column 1 rates. This elimination is alleged by defendants to have been made entirely in error, without authorization of the participating carriers, and in violation of standard rate bureau procedure for such tariff changes. In item 4320-A of SWL Tariff 210-L, ICC 5183, effective September 4, 1975, the restriction against application on diethylene or ethylene glycols was removed.

In addition to the chronological summation of the tariff publishing events, complainant argues the assailed combination rate is prima facie unreasonable in violation of the act in view of the fact that the sought rate was maintained for at least 12 years and changed without any notice to the public or signal in the tariff item indicating an increase. Moreover, complainant stresses that the defendants have no desire to profit from their own "inadvertent errors" since they are processing two special docket applications seeking authorization to waive collection of undercharges on the same rate basis as involved in the immediate complaint and have, therefore, conceded the unreasonableness of the assailed combination rate. Complainant has submitted a rate comparison of the class 100 rates applicable on the involved commodities from West Lake Charles and Lake Charles, La., to Omaha and other representative destinations in the same general territory in order to show the unreasonableness of the assailed combination rate. Rates shown in the exhibit were in effect on January 27, 1972, the day before the defendants' commodity rate was nullified by the publication error herein alleged. That exhibit shows that defendants' rate to Omaha was 10.5 percent of the class 100 rate and that the commodity rates to all other representative destinations range between 9.26 and 12.83 percent of the class 100 rates, while the assailed combination rate resulting from the alleged tariff error on the movement from West Lake Charles to Omaha is approximately 17 percent of the class 100 rate. Complainant indicates that the assailed combination rate represents an increase in excess of 61 percent over the sought rate.

As further evidence of the unreasonableness of the assailed rate, complainant stresses that defendants presently maintain commodity rates equal to the level of the sought rate which were not canceled or otherwise affected by the alleged error on carload shipments of numerous other commodities from West Lake Charles to Omaha and other points in the same general territory.

The Administrative Law Judge found that the misplacing of "note 11," through error or otherwise, created a tariff nullity, that the rates assessed by defendants on the movement of ethylene glycol in issue were applicable and dismissed the complaint. Essentially, his reasoning was based on the principle set out *Calcium Carbonate Co. v. Missouri Pac. R. Co.*, 329 I.C.C. 458, 461 (1967), which states generally that when strict construction of a tariff leads to an unjust and absurd result, the assailed provision which creates the unjust result will be ignored. As indicated, the Administrative Law Judge declined to decide the issue of reasonableness since it was felt jurisdiction was lacking. Complainant had made no affirmative showing that an action at law had been initiated within the 3-year statutory time period provided by section 16(3) of the act.

On exceptions, both complainant and defendants allege the initial decision erroneously states that there is nothing in the record save the assertion of Continental to support the allegation that a printer's error caused the tariff mistake, and that the sequence of placements of "note 11" column additions, and changes in annotation meaning was obviously intentional, however misguided or confused the reasoning might have been. Both parties assert there is ample evidence in the record to show the alleged error was unintentional and without authorization.

Defendants except to the "inconsistent" finding in the initial decision that the "note 11" restriction resulted in a tariff nullity as in *Calcium Carbonate Co.* v. *Missouri Pac. R. Co., supra,* and the finding that the applicable rate should have been those rates which would have applied had the "note 11" restriction not been placed where it was, namely, the sought rate, and that the "rates assessed" by defendants in the instant proceeding were applicable. Defendants argue that if a tariff nullity was found to exist, the initial decision should have found the applicable rates to be the rates initially assessed by defendants, not the assailed combination rates being assessed in court, that no undercharges were due, and dismissed the complaint.[4]

Defendants further allege that the initial decision erroneously fails to consider the tariff error itself as bearing on the issue of reasonableness of the assailed rates if the principle set out in *Calcium Carbonate Co.* v. *Missouri Pac. R. Co., supra,* is not applicable to the facts in this proceeding. The initial decision, according to defendants, places a heavy burden on the shipper in this case to check the provisions of the tariff before tendering a shipment. Defendants stress that in the instant case the shipper had been shipping under a rate which had been in effect for over 12 years and thereby had a right to expect some public notice of such a substantial increase as required under normal rate bureau procedures. Defendants state that there was no public docketing of any rate increase proposal, and that none of the normal rate bureau procedures were instituted which are a condition precedent to the joint action of the carriers making such a substantial change. Defendants urge that in these circumstances, the resulting combination rates could have been condemned, even though in the abstract under orthodox criteria of reasonableness, the rates might not otherwise be unreasonable. *Constitution Stone Co.* v. *Baltimore & O. R. Co.,* 231 I.C.C. 562 (1939); *American Woolen Co., Inc.* v. *Boston & M. R.,* 237 I.C.C. 187 (1940); *Long Island Produce & Fertilizer Co., Inc.,* v. *O. S. S. Co.,* 237 I.C.C. 605 (1940); and *Auburn Mills* v. *Chicago & A. R. Co.,* 222 I.C.C. 495 (1937), are cited in support.

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[4] It appears the basis of this exception and others is confusion over meaning of the terms "rates assessed" used in the "Findings and Order" portion of the initial decision. When the decision is read in its entirety, we think "rates assessed" as used in the findings and order of the initial decision can mean only "rates initially assessed," i.e., the sought rate, since the initial decision found a tariff nullity which made the sought rate the applicable basis. After the sought rate was found to be the applicable basis, there were no undercharges to waive, and the complaint was dismissed. Reference to voluntary payment of the undercharges in the paragraph immediately prior to the section entitled "Findings and Order" refers to the undercharges conceded by complainant to be due.

Complainant similarly excepts to an apparent disregard of evidence presented which shows the sought rates had been in effect for a long period of time. Complainant cites *Auburn Mills* v. *Chicago & A. R. Co., supra,* wherein the Commission recognized that rates which have been voluntarily maintained for long periods of time are presumed to be reasonable, and when long-established rates are raised for a short period of time and then voluntarily reduced, the presumption is that the higher rate in the interim was unjust and unreasonable. Moreover, complainant stresses that its rate comparison shows the assailed rates are out of line with the rates for comparable movements under similar circumstances and alleges that the initial decision erroneously denies that rates depressed by water competition could be a reliable standard of reasonableness under the circumstances. Complainant argues that rates which may otherwise be reasonable may nevertheless be unreasonable because of the occurrence of events and resulting conditions unintended or unforeseen when such rates were published. Therefore, it concludes that a rate could be unreasonable as applied to shipments in question without regard to the question of maximum reasonableness in general application. *Standard Packing Co.* v. *Union Pac. R. Co.*, 178 I.C.C. 203 (1931), is cited in support.

In addition, complainant alleges that the fact that defendants do not contest the shipper's claim that the assailed rates are unjust and unreasonable is some indication that such rates are unjust and unreasonable. Complainant asserts that the initial decision is in error in failing to consider this evidence. *Kent Feeds, Inc.,* v. *Pennsylvania R. Co.*, 319 I.C.C. 427 (1963), among other cases is cited in support.

DISCUSSION AND CONCLUSIONS

The issue is whether the alleged undercharges should be waived. As noted, the initial decision found the applicable rate to be the sought rate and that such rate should have resulted in lawful charges of $62,132.82. This finding was based on a tariff nullity resulting from the misapplication of a tariff restriction to an entire commodity group and rested on the principle set out in *Calcium Carbonate Co.* v. *Missouri Pac. R. Co., supra,* which held, generally, that strict construction of a tariff will not be adhered to where such construction would lead to an unjust and absurd result.

We have concluded, however, that strict construction of the involved tariff item does not produce an unjust or absurd result, and thus the *Calcuim Carbonate* principle is inapplicable. For example, a reference to item 4320 of SWL Tariff 210-K attached as the appendix hereto shows that the commodity description includes "glycols" and "proprietary anti-freeze preparations." The rates in column 1 of the item had application to proprietary antifreeze preparations as well as glycols. The inadvertent placement of the reference to "note 11" against the entire glycol group thereby denying use of column 1 rates for that group did not affect the use of the column 1 rates for proprietary antifreeze preparations. Since every rate in the item had some application, namely, those to destinations other than St. Joseph, the column 1 rate to St. Joseph on proprietary antifreeze preparations, and the column 2 rate to St. Joseph on both glycol and proprietary antifreeze preparation, *Calcium Carbonate Co.* v. *Missouri Pac. R. Co., supra,* is distinguishable. Therefore, we conclude the assailed combination rates were legally applicable to the movements in question.

The Administrative Law Judge failed to determine whether the assailed combination rates were unreasonable since the complainant had failed to make an affirmative showing that an action at law had been initiated within the 3-year statutory time period set out in section 16(3) of the act. As noted in the petition, Continental filed a complaint with the Commission prior to the actual initiation of the action at law by defendants for collection of the alleged undercharges. That complaint merely alluded to the initiation of the action at law, but complainant refiled an amendment complaint with this Commission specifically identifying the action at law in the district court. Although the amended complaint was duly received, it never became part of the docket. Consequently, the Administrative Law Judge was never aware that the action at law had been instituted.

Carriers have a 3-year statutory period in which to bring an action at law to recover undercharges under section 16(3)(a) of the act. Section 16(3)(d) provides: "If on or before expiration of the two-year period of limitations in subdivision (b) *** a carrier subject to this part begins action under subdivision (a) for recovery of charges in respect of the same transportation service, *** said period of limitation shall be extended to include ninety days from the time such action is begun ***." The Commission has consistently interpreted this paragraph to allow a shipper to file its complaint within 90 days after the carrier begins an action, regardless of whether the carrier brings suit within 2 or 3 years. See *Foremost Food & Chemical Co.* v. *Alton & S. R.*, 318 I.C.C. 35, 38 (1962); *Robert Burns Lumber Co.* v. *Chicago, St. P., M. & O. Ry. Co.*, 168 I.C.C. 179, 180 (1930); and *Crerar Clinch Coal Co.* v. *A. A. R. Co.*, 118 I.C.C. 171, 173 (1926). Defendant carriers brought an action within 3 years from the date the cause of action accrued. The formal complaint was filed within 90 days of that action, and, therefore, within the statutory period. The issue of reasonableless of the assailed combination rates is properly before us.

When a tariff rule or restriction, otherwise reasonable, but because of unforeseen circumstances wholly beyond the control of any of the parties, becomes unreasonable in its application, it is proper, giving due consideration to all of the conditions and circumstances involved, for this Commission to weigh the facts presented and, where the circumstances warrant, to give relief. *Jasper Novelty Furniture Co.* v. *Southern Ry. Co.*, 272 I.C.C. 513, 517 (1948). On previous occasions, erroneously published rates have been found unreasonable to the extent of their excess over rates intended to be applied. *Constitution Stone* v. *Baltimore & O. R. Co.*, 231 I.C.C. 562 (1939). The evidence in the immediate proceeding shows: that the assailed combination rates resulted from an admitted tariff publishing error; that the sought rate was in effect for a long period of time prior to the publication error and was restored when the error was detected; that the carriers assessed charges based on the sought rate indicating that even they were unaware of the impact of the misplaced tariff restriction; that the commodity rates comparable to the sought basis continued to apply to other destinations in the general area of Omaha during the period the publication error was in effect; and that the assailed combination rates were about 6 percent higher in relation to the class 100 rates than the rates contemporaneously in effect on ethylene glycol from the same origin to destinations in the same general territory. While none of the above factors standing alone conclusively shows the assailed combination rate exceeds the maximum of reasonableness, the factors, when viewed in combination, are convincing that the assailed combination rate is unreasonable to the extent it exceeds the sought rate and supports a waiver of collection of undercharges.

We find that the assailed combination rate is unreasonable to the extent it exceeds the single-factor rate on 53 shipments of ethylene glycol, in carloads, from West Lake Charles, La., to Omaha, Nebr.

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We further find that this decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

It is ordered, That the defendants be, and they are hereby, notified and required to cease and desist and thereafter to abstain from charging, demanding, collecting, and receiving rates higher than the single-factor rates found just and reasonable herein for the transportation of ethylene glycol.

It is further ordered, That defendants be, and they are hereby, authorized to waive collection of undercharges in the amount of $40,896.04 on 53 tank carloads of ethylene glycol that were shipped by complainant or for its account from West Lake Charles, La., to complainant or its custom packaging agent at Omaha, Nebr., during the period May 3, 1973, through October 12, 1973, inclusive.

And it is further ordered, That this order shall continue in force until further order of the Commission.

APPENDIX

Pertinent tariff item from Southwestern Freight Bureau Tariff 210-K

ITEM	COMMODITY	FROM	TO	RATES IN CENTS PER 100 LBS COLUMNS 1	RATES IN CENTS PER 100 LBS COLUMNS 2
4320	Glycols: Diethylene or ethylene. (Note 11) Diethylene, ethylene or mixtures thereof. (Note 11) Proprietary anti-freeze preparations made from denatured ethyl alcohol, methanol, ethylene glycol, diethylene glycol, polyethylene glycol, propylene glycol, dipropylene glycol or hexylene glycol, with or without inhibitor. COLUMN 1--In tank cars, CL, subject to Item 610, Column 2 or 3. COLUMN 2--In tank cars, CL, R35 and min wt provided therein for cars of not less than 20,000 gallon capacity, but in no case less than 180,000 lbs per car.	Bayport.............TX Chaison.............TX Dixico..............TX Freeport............TX Highlands...........TX Houston.............TX Lake Charles........LA North Seadrift......TX Orange..............TX Plaquemine..........LA Port Arthur.........TX Port Neches.........TX Sterlington.........LA Taft................LA Texas City..........TX West Lake Charles...LA	Council Bluffs (Notes 3 and 5)...IA	67 (Note 1)	....
			Des Moines(Note 6)..IA Highland Park (Note 7)..........IA	86	....
			Omaha (Notes 2 and 4)..........NE South Omaha(Notes 2 and 4)..........NE	67 (Note 1)	....
			St Joseph (Notes 9 and 10).........MO	67 (Note 1)	59 (Note 1)

NOTE 11--Applies only in connection with rate in Column 2 to St. Joseph, MO.

EX PARTE NO. 289

REMITTANCE OF DEMURRAGE CHARGES BY COMMON CARRIERS OF PROPERTY BY RAIL

Decided March 18, 1977

Upon investigation, proposed regulation requiring remittance to the freight car owner by a nonowning railroad, on whose lines a car is being detained under demurrage, of all demurrage charges collected in excess of $10 per car per day, modified in certain respects, and adopted. Appropriate order entered.

Curtis H. Berg, W. Donald Boe, Jr., and *William R. Power* for carrier proponents.

C. W. Bath, Oliver Callson, T. A. Ellaby, James F. Fox, H. Richard George, James J. Irlandi, James E. Isbell, Jr., A. E. Leitherer, J. W. McDermond, Thomas F. McFarland, Jr., Robert P. Post, Jon R. Roy, Larry G. Smethers, Harold E. Spencer, A. T. Walter, and *George William Wright* for private car owner or lessee proponents.

Robert C. Blinn, Emried D. Cole, Jr., Donald E. Cross, Robert S. Davis, Samuel P. Delisi, Thomas C. Dorsey, Louis T. Duerinck, Richard S. M. Emrich III, James L. Howe III, Peter J. Hunter, Jr., Harvey Huston, C. H. Johns, Howard D. Koontz, Albert W. Laisy, Richard D. Lalane, Patrick McEligot, Richard J. Murphy, Joseph J. Nagle, R. R. Pumphrey, T. J. Siegel, John McDonald Smith, T. M. von Sprecken, Jr., R. H. Stahlheber, Sidney Weinberg, and *Kinga M. LaChapelle* for carrier opponents.

Barry Chasnoff, John Hart Ely, and *William A. Kutzke* for United States Department of Transportation, opponent.

REPORT AND ORDER OF THE COMMISSION ON FURTHER HEARING

O'NEAL, *Commissioner*:

This proceeding was instituted by notice of proposed rulemaking and order of October 12, 1972. (Notice was published in the Federal Register on October 26, 1972, Vol. 37, p. 22884.) Therein, adoption of a proposed rule was set forth for consideration. The proposed rule would require that: "The non-owning railroad on whose line a car is being detained under demurrage, shall remit to the railroad car owner all demurrage charges collected in excess of $10 per day." All common carriers of property by railroad subject to the Interstate Commerce Act (the act) were made respondents. They along with all other interested parties were invited to submit written statements of facts and arguments. In response to these representations an interim report of the Commission (349 I.C.C. 411), entered March 28, 1975, and served April 25, 1975, was issued. In the interim report, certain procedural matters were initially resolved. We held that the Commission had jurisdiction to allocate demurrage revenues under sections 1(11), 1(14)(a), and 1(15), and that no oral hearing was required in this proceeding. Also, in discussing the merits of the proposed rule, we concluded in the interim report that its adoption was warranted in principle. Car utilization would be improved and the greater return on the car owner's investment, which would result from our adoption of the proposed rule, would increase the incentive to invest in freight cars and thereby improve car supply. We also determined that private car owner participation in the rule was also supported by these same principles of car utilization and supply. However, because of the lack of evidence on the cost and administrative aspects of the rule, the proceeding was reopened for the receipt of further evidence on its feasibility and implementation. Participants were asked to submit specific information concerning present demurrage records and the modification and additional expenses which would be incurred by the implementation of the proposed rule. Nineteen guideline questions were provided to aid participants in the presentation of the requested material. The notice of amended rulemaking proceeding was published in the Federal Register, April 30, 1975 (Vol. 40, No. 84, p. 18797).

One hundred and eighteen parties including 101 rail carriers or carrier organizations submitted evidence on the merits, feasibility, and implementation of the rule. Twenty-six[1] initial and thirteen reply statements were filed. Most carriers submitted their information through the Association of American Railroads or the

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[1] Petitions for leave to intervene filed by Duval Sales Corporation, Evans Products Company, and International Minerals and Chemical Corporation jointly, and Pullman Transport Leasing Company separately, were granted by orders entered September 24, 1975. The petition for leave to intervene filed by FMC Corporation was granted by order entered November 28, 1975. By order entered August 10, 1976, the initial statements of the Delaware and Hudson Railway Co. (D&H) and the Detroit Terminal Railroad Company were striken for failure to serve a copy of these statements on all parties of record. D&H's statement was subsequently admitted by order entered March 11, 1977.

American Short Line Railroad Association. A few other parties consolidated their views.

As in the interim report, we will group participants according to their major viewpoints. They are (1) carrier proponents,[2] (2) private car proponents,[3] and (3) opponents who consist mainly of carrier and carrier organizations.[4]

All evidence and arguments not mentioned have been considered and given due weight. Discussion of many of the various examples given in support of argument has been omitted since its inclusion would unduly lengthen this report. Similar arguments of the various participants will be discussed together to simplify discussion of the various positions.

Before discussing the merits, costs, and feasibility of the implementation of the proposed rule, we will consider what effect, if any, the amendment of section 1(6) of the Interstate Commerce Act by the Railroad Revitalization and Regulatory Reform Act of 1976 (4RA) has on the Commission's jurisdiction in this proceeding. Except for the jurisdictional issue, we will set out our discussion and conclusions of the participants' contentions after the presentation of all the arguments and evidence.

JURISDICTION

Jurisdiction.—Section 1(6) was amended by the 4RA as follows:

> Demurrage charges shall be computed, and rules and regulations relating to such charges shall be established, in such a manner as to fulfill the national needs with respect to (a) freight car utilization and distribution, and (b) maintenance of an adequate freight car supply available for transportation of property.

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[2] Burlington Northern, Inc., and Union Pacific Railroad Company.

[3] Archer Daniels Midland Company; Allied Mills, Inc.; Bay State Milling Company; Cargill, Incorporated; Duval Sales Corporation; Evans Products Company; FMC Corporation; Garvey, Inc.; General American Transportation Company; General Mills; Hercules, Incorporated; International Minerals and Chemical Corporation; International Multifoods Corporation; Peavey Company; The Pillsbury Company; Pullman Transport Leasing Company; and Swift Edible Oil Company and Swift Fresh Meats Company—Division of Swift and Company.

[4] American Short Line Railroad Association; Association of American Railroads; Robert W. Meserve and Benjamin H. Lacy, Trustees of Property of Boston and Maine Corporation, Debtor; Cedar Rapids and Iowa City Railway Company; Chicago, Milwaukee, St. Paul and Pacific Railroad Company; Elgin, Joilet and Eastern Railway Company; Florida East Coast Railway Company; Illinois Central Gulf Railroad Company; Robert C. Haldeman, Trustee of Property of Lehigh Valley Railroad Company; Louisville and Nashville Railroad Company; Mississippi Export Railroad Company; Norfolk and Western Railway Company; Robert W. Blanchette, Richard C. Bond, John H. McArthur, Trustees of Property of Penn Central Transportation Company, Debtor (now a part of ConRail); and Delaware and Hudson Railway Company.

By order dated February 27, 1976, the Commission noted that the amendment of section 1(6) appeared consistent with the announced purposes of this proceeding, and solicited comments on the effect of the amendment. Eighteen statements in response were submitted.[5]

The parties principally discuss whether the recent amendment conferred, confirmed, or refuted the Commission's jurisdiction to establish the proposed rules. Carrier opponents generally argue that the Commission did not have jurisdiction before section 1(6) was amended and that jurisdiction was not conferred by the recent amendment. Counter arguments by carrier and private car owner proponents, however, state that the amendment confirms the Commission's authority to promulgate the proposed rule.

Carrier opponents.—Opponents to the rule argue that the stated purposes of the amendment are defeated by the proposed remittance scheme, which is said to be governed by principles of equity, not of car utilization and distribution, or of an adequate supply. They argue that no evidence has been presented to establish that the proposal will cause car owners to purchase additional, or shippers to release equipment expeditiously. In fact, the rule is argued to have the opposite effect since nonowning carriers will have less motivation to collect demurrage charges for the reason that they will be remitting the excess amount to car owners; and shippers detaining their own equipment, it is further argued, will have less incentive to release cars quickly because demurrage in excess of $10 will be remitted to them. (Further elaboration of these points will be given in the discussion of car utilization infra.) It is also contended that since the amendment merely authorizes the Commission to regulate the "level" of demurrage charges, it does not confer power to divide the charges—as is being done in this proceeding.

Still another argument is that the Commission is trying to combine unlawfully the two powers conferred by the amendments to sections 1(6) and 1(14)(a) of the act: the power to compensate an owner for the use of its cars and the power to regulate the use of cars.[6] Section 1(14)(a) of the act was amended to encourage the purchase, acquisition, and efficient utilization of freight cars. In establishing rules and regulations (after oral hearing) for the compensation to be paid a car owner, the Commission was directed to consider whether there is just and reasonable compensation to the owner, and whether it will contribute to sound car practices and encourage the acquisition and maintenance of car supply. This, it is argued, has not been done in this proceeding. Therefore, the Commission has no jurisdiction under section 1(14)(a), and cannot combine this section's compensatory element with the demurrage provisions of section 1(6).

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[5] American Short Line Railroad Association; Archer Daniels Midland Company; Association of American Railroads; Bay State Milling Company; Burlington Northern, Inc.; Cedar Rapids and Iowa City Railway Company; Duval Sales Corporation; Evans Products Company; Exxon Company, U.S.A.; Farmland Industries, Inc.; Florida East Coast Railway Company; FMC Corporation; General Mills; Grain Divisions/Cook Industries; International Minerals and Chemical Corporation; International Multifoods Corporation; Mississippi Export Railroad Company; Missouri Pacific Railroad Company; Peavey Company; Penn Central Transportation Company; The Pillsbury Company; Pullman Transport Leasing Company; U.S. Department of Transportation; and the Union Pacific Railroad Company.

Private car and carrier proponents.—Proponents, on the other hand, contend that the legislative history of the amendment to section 1(6) supports the Commission's jurisdiction. In this regard, it is pointed out that the House Committee and Senate Report indicates that section 1(6), as amended, "requires the Commission to establish rules and regulations for the computation of demurrage charges so that freight car utilization is maximized and car owners receive adequate compensation." Final Conference Report, S. Rep. 94-595 and H.R. 94-781, 94th Cong., 2d Sess. 135 (1976). In addition, proponents contend that the "national needs" for maintenance of an adequate freight car supply are not being met under the traditional demurrage system because lines which do not invest in cars are being rewarded at the expense of actual investors. However, if demurrage charges are paid in part to car owners, such charges will increase the car owner's return on its investment and will thereby be an added incentive to purchase additional cars. This, proponents stress, will help maintain an adequate freight car supply.

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[6] Sec. 1(14)(a):

> (14)(a) It is the intent of the Congress to encourage the purchase, acquisition, and efficient utilization of freight cars. In order to carry out such intent, the Commission may, upon complaint of an interested party or upon its own initiative without complaint, and after notice and an opportunity for a hearing, establish reasonable rules, regulations, and practices with respect to car service by common carriers by railroad subject to this part, including (i) the compensation to be paid for the use of any locomotive, freight car, or other vehicle, (ii) the other terms of any contract, agreement, or arrangement for the use of any locomotive or other vehicle not owned by the carrier by which it is used (and whether or not owned by another carrier, shipper, or third party), and (iii) the penalties or other sanctions for nonobservance of such rules, regulations, or practices. In determining the rates of compensation to be paid for each type of freight car, the Commission shall give consideration to the transportation use of each type of freight car, to the national level of ownership of each such type of freight car, and to other factors affecting the adequacy of the national freight car supply. Such compensation shall be fixed on the basis of the elements of ownership expense involved in owning and maintaining each such type of freight car, including a fair return on the cost of such type of freight car (giving due consideration to current costs of capital, repairs, materials, parts, and labor). Such compensation may be increased by any incentive element which will, in the judgment of the Commission, provide just and reasonable compensation to freight car owners, contribute to sound car service practices (including efficient utilization and distribution of cars), and encourage the acquisition and maintenance of a car supply adequate to meet the needs of commerce and the national defense. The Commission shall not make any incentive element applicable to any type of freight car if the Commission finds that the supply of such type of freight car is adequate. The Commission may exempt such incentive element from the compensation to be paid by any carrier or group of carriers if the Commission finds that such an exemption is in the national interest.

The U.S. Department of Transportation (DOT) contends that one of the goals of Congress in enacting the 4RA was to encourage the purchase, availability, and efficient utilization of cars. This is reflected in the amendments to section 1(6) and 1(14)(a) of the act, which the DOT argues, require a complete reassessment by the Commission of all rules governing freight car acquisition, maintenance, distribution and utilization. It is submitted that this proceeding is too narrow and does not adequately deal with these concerns. Proponents, therefore, recommend that this proceeding be suspended and a broad investigation of the best methods to assure sufficient availability and utilization of freight cars be instituted.[7]

Conclusions.—The legislative history of the amendment to section 1(6) of the act and the wording of the section itself establishes the Commission's jurisdiction to remit excess demurrage charges to car owners to provide them with adequate compensation for the use of their cars. The Joint Explanatory Statement of the Committee of Conference, Report 94-768, p. 128, 94th Cong., 1st Sess. (1975), states that:

> The House Amendment requires that rules and regulations be established for the computation of demurrage charges so that freight car utilization was maximized.
>
> Conference Substitute
>
> The conference substitute follows the House Amendment, but insures the Commission will consider the transportation use [sic] the car and provide a fair return on investment in freight cars.

Further evidence is presented that the legislature indicated that charges contain a compensatory element. In the Joint Explanatory Statements of the Committee of Conference, Report 94-781, p. 142, 94th Cong., 2d Sess. (1976), two different breakdowns for sections

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[7] The Union Pacific Railroad Company filed a response to the DOT's statement, referring to it as a motion to suspend the instant proceeding. The statement is in the form of a recommendation, is not separately titled as a motion, and, therefore, will not be considered as a motion but as a request or recommendation.

1(6) and 1(14)(a) indicate that demurrage charges can be used to compensate owners of cars as well as per diem charges. The report states that the proposed legislation:

> (13) requires the Commission to establish rules and regulations for the computation of demurrage charges so that freight car utilization is maximized and car owners receive adequate compensation;
> (14) reforms existing law with respect to compensation when one carrier pays for the use of a freight car owned by another carrier; ***

Specific mention of this proceeding is also made in the Report of the Committee on Interstate and Foreign Commerce, Report No. 94-725, p. 241, 94th Cong., 1st Sess. (1975). In discussing the Commission's continuing activities in the area of demurrage, it stated that:

> The purposes of the proposals are to create an added incentive for the car owner to acquire additional cars and remove any inducement to the nonowner to encourage detention of foreign cars in order to benefit from collection of demurrage charges.

Thus, the legislative history of section 1(6) clearly indicates that the Commission is not restricted to section 1(14)(a) of the act in providing an incentive for car owners to acquire additional cars. The amendment provides another basis of jurisdiction in addition to the Commission's car service authority discussed in the interim report (349 I.C.C. 411, 415). Freight car supply will be fostered under the rule as investors receive a greater return on their investment, which will be an added incentive for the purchase of additional cars. As more fully elaborated in the Discussion and Conclusions hereinafter, the proposed rule clearly will fulfill the purposes of section 1(6) by meeting the Nation's needs for the maintenance of an adequate freight car supply. Therefore, we find that the Commission has jurisdiction to promulgate the proposed rule.

In regard to the request of the DOT to suspend this proceeding in favor of a broader investigation, any further delay in the ultimate determination of this proceeding would only complicate and postpone the Commission's efforts to alleviate car shortages. The request will, therefore, be denied.

ADMINISTRATIVE COSTS OF IMPLEMENTATION

Private car and carrier proponents.—Carrier and private car proponents argue that the railroads presently require sufficient recordkeeping data to institute the proposed new demurrage remittance scheme with minimal expense. Proponents point out that railroads presently keep accurate demurrage records showing car ownership and number, constructive placement date, actual placement date, date of release, amount of demurrage, et cetera. Accordingly, they conclude that the only additional burden that will be placed on the delivering road is the computation of the arbitrary or excess demurrage charges.

Some private car proponents feel that opponents to the rule have exaggerated the administrative startup and annual costs of the remittance to include installation of new computer systems and other extraneous expenses which would be incurred even without the adoption of the rule. They argue that railroads could use demurrage bureaus and other associations to handle the administrative and recordkeeping functions and provide the necessary auditing safeguards, which exist in the present system. Costs would, therefore, be minimized. No direct evidence of the costs of the proposed rule was provided by private car proponents, as this information was thought to be within the knowledge of the carriers.

It is also pointed out by private car proponents that the extension of the rule to private car owners will not result in excessive administrative costs. Tariffs presently provide for the payment of mileage allowances to private car owners on tank cars and nontank cars. Railroads also keep accurate records of the movement of private cars over their lines; data is gathered and consolidated; and payments are made on a "fleet" basis to the private car owners. Therefore, a framework for the proposed rule is said to exist already.

The two carrier proponents, the Burlington Northern (BN) and the Union Pacific Railroad Company (UP), submitted data on the costs of implementing the rule on an individual basis. They used the last 6 months of 1973 as their study period. They state that the present recordkeeping system can provide the necessary information, although an expanded computer printout to display the required data would be needed by the BN and the UP would have to modify its average-agreement forms. Startup expenses for BN would be $2,500, and for UP startup would be $1,950. Annual expenses thereafter would be $48,180 for the BN and $16,000 for the UP, for additional personnel.

Carrier opponents.—The Association of American Railroads (AAR)[8] estimates that the annual costs of administering the rule will range between $1.5 and $2 million. It submits an estimated startup and annual cost for 89 railroads which total approximately $500,000 for the former costs and over $1.5 million in annual administrative expenses. These additional costs are based on the projected need for additional employees (auditors, clerks, and supervisors), forms, travel, and computer expenses. Some of the carriers indicate that the methodology needed to implement the rule was used in preparing the cost data presented to the Commission. The following table shows the costs for 12 selected railroads (including the 2 carrier proponents, the UP and BN).

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[8] The AAR represents all its members except the BN, UP, Denver & Rio Grande Western Railroad Company, and Pittsburgh & Lake Erie Railroad.

TABLE 1

Estimated startup and annual costs

Carrier	Startup	Annual
Atchison, Topeka & Santa Fe Railway Company	$4,350	$48,070
Burlington Northern, Inc	2,500	48,180
Chicago and North Western Transportation Company	17,200	99,063
Chessie System	31,184	208,366
Florida East Coast Railway Company	500	10,000
Illinois Central Gulf Railroad Company	135,000	133,200
Missouri Pacific Railroad	7,484	80,834
Norfolk and Western Railway Company	6,500	110,954
Penn Central Transportation Company[1]	77,945	332,713
Southern Railway System Lines[2]	------	224,000
Southern Pacific Transportation Company	7,512	46,500
Union Pacific Railroad Company	1,950	16,000

[1] Now a part of ConRail.

[2] Costs without using a demurrage bureau.

Cost data was also presented by three demurrage bureaus. The bureaus believe that the costs of administering the rule would be lower if necessary accounting and auditing functions were done on a group basis as is presently done on a large portion of charges for demurrage, detention storage, and average agreements. While, additional expenses will still be incurred in implementing the rule (for personnel, forms, travel, and computer expenses), on a group basis these costs will assertedly be less than if each railroad performed the functions individually. The foreseeable costs which would be prorated among the bureau members are estimated as follows:

TABLE 2

Costs of demurrage bureaus

Bureau	Startup	Annual
Pacific Car Demmurrage Bureau (for 34 member railroads)	[1]$12,129	[2]$87,129
Southeastern Demurrage and Storage Bureau (for 58 member railroads)	15,032	208,392
Demurrage, Western Weighing and Inspection Bureau (for 91 member railroads)	-------	397,464

[1] This represents costs for new forms which it appears would be used throughout the year, and, therefore, is not an accurate startup cost.

[2] The annual estimated cost will be $110,000 more if the bureau polices the rule where there are no regional bureaus certifying the amount.

Only three railroads, the Chessie System, Penn Central Transportation Company (PC) (now a part of ConRail), and Southern Pacific Transportation Company (SP), specifically indicate that their costs include the amounts to be paid the demurrage bureaus.[9] Therefore, it is unclear whether the costs submitted by the other individual railroads are costs which (1) would be incurred if the demurrage bureaus were not utilized, (2) would be incurred in addition to the costs reported by the demurrage bureaus, or (3) include individual costs and costs payable to the demurrage bureaus.

To obtain an indication of the administrative costs if demurrage bureaus were utilized, we took the number of excess demurrage days presented by the Pacific Car Demurrage Bureau's members and divided that by the prorated costs to the members.[10] The startup and annual cost for each excess day is $0.035 and $0.2514 respectively.

The American Short Line Railroad Association (ASLRA), utilized cost data submitted by 46 member lines[11] to project the costs of administering the rule for its 214 member lines. The expenses based on a per-car-handled basis (which includes all revenue cars handled and not just arbitrary cars) are as follows:

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[9] The Pacific Car Demurrage Bureau, and nine Demurrage, Western Weighing and Inspection Bureau members' costs were their allocable portion of the demurrage bureau costs. The 21 members of the Southeastern Demurrage Bureau did not present individual prorated costs, only the total costs to the bureau of all its members.

[10] The bureau submitted the prorated costs to the individual roads so that we could compute the charges for each excess day. It was the only bureau to provide us with this breakdown. The startup cost is not totally accurate as it represents the cost of new forms which would be used throughout the year. The startup and annual costs per excess day represents the costs prorated over the annualized excess days.

[11] One member of the ASLRA study group is the Cedar Rapids and Iowa City Railway Company (CRANDIC) which also submitted data to the AAR. There could be other overlaps in the ASLRA's projection of costs to its total membership if demurrage bureaus have also submitted costs for the same road. However, from the evidence presented, we are unable to calculate the frequency of this double reporting. The ASLRA study group included 27 members in the eastern territory, 7 in the southern territory, 2 in the western territory, and 3 in the Mountain Pacific territory.

TABLE 3

Additional administrative expenses of rule for A.S.L.R.A. membership

Railroads	Total cars handled	Expenses per car	Total expenses
Class I Switching and Terminal	3,687,518	$0.035	$129,063
Class II Switching and Terminal	995,944	.081	80,671
Class I Line-haul	1,508,202	.0115	173,443
Class II Line-haul	1,703,935	.0115	195,953
Total	7,895,599	------	579,130

These figures are based on data submitted by the study group carriers for the time and cost of preparing the administrative study (which was done on a manual basis). These costs do not include the auditing, claims, or overhead expenses associated with the proposed rule. ASLRA states that if these expenses were added to the above figures, the total expenses would be $1 million annually. It is argued that such an increase in administrative costs is a needless and unjustified waste of carrier revenues.

The rule can either be implemented by the reporting roads on a manual or computer basis, or the administrative functions could be turned over to demurrage bureaus or other carrier associations. Costs would vary accordingly. Assessments of individual implementation of the rule are provided by the Chicago, Milwaukee, and St. Paul and Pacific Railroad (CMSP) and the Chicago and North Western (CNW). Assessments of demurrage bureau implementation are provided by the Pacific Car Demurrage Bureau (PCDB) and Southeastern Demurrage and Storage Bureau (SFDSB).

The CMSP states that if the proposed rule were put into effect, it would have to develop an entirely new system for accumulating demurrage records. This would mean converting its present manual method into a computerized system. Such a changeover would entail new forms, converting present records into machine-processable records, and computer programming. After these initial startup

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[16] The expenses are based on averaged data from the first quarter of 1975 for the 46 roads in the ASlra's study group. These costs were projected to the entire membership by multiplying the number of cars handled in 1974 for each class and type.

programs (amounting to $142,800), CMSP also indicates it would incur $714,350 annually in administering the rule. This figure is based on the costs of 5 keypunch operators, 1.52 full-time computer programers, 15 auditors and 3 supervisors. The startup and annual costs for CMSP for each excess demurrage day are $1.0893 and $5.4493, respectively.

The CNW indicates that it would implement the rule on a manual basis, as is presently done with its demurrage records. Employees would record the car initial and number, name of car owner, station accounting number and name, miscellaneous bill date and number, number of excess demurrage days, and amount of refund to car owner. It would also maintain a list of payments made at stations, which would be verified against billings. After verifications are made, cars would be drawn off listings and classified by car owners for payment. The startup and annual costs for each excess day are $0.1028 and $0.5921, respectively, for CNW.

The PCDB presently receives from its members a monthly copy of demurrage records covering all cars reported. These reports are reviewed for possible under- and overcharges, and claims are handled by the Bureau. Under the rule it would also determine the amounts due from other railroads and certify that the proper remittance was made between carrier members and other railroads. It anticipates that if the rule goes into effect, it would need six additional clerks to analyze each demurrage record for possible remittance to car owners, and for further review if claims are presented and adjustments made. A separate filing and posting system would also be needed, a number of forms would have to be revised, and several new six-part forms printed to cover remittance and record of cars to car owners.

The SEDSB reviews records to determine charges exceeding the value of $10 per car per day, identify car owners, car initial and number, station, date of demurrage or detention bill, and amount due. On average agreements, it will require a complete restatement of all cars for industries which habitually delay cars. Under the proposed rule the excess amount will be identified as to the car owner, and auditors will review railroad accounts to determine if proper amounts are paid. Both the SEDSB and PCDB will assure the proper transfer of funds for railroads in other territories, with the understanding that similar bureaus in other territories will do the same. They state that otherwise the rule will be impossible to administer. AAR replies, based on the evidence presented in all the initial statements, that the annual cost for administering the rule is approximately $3.5 million dollars.

The following table is our summary of the costs of the proposed rule as alleged by respondents. It is based on data submitted by 42 roads for the period July 1 through December 31, 1973.

TABLE 4

Costs for implementing proposed rule

I. Startup expenses	
(1) Lowest startup expense (Sunset Ry.)	$6.00
(2) Highest startup expense (CMSP)	142,800.00
(3) Average startup expense	14,219.00
II. Annual expenses	
(1) Total annual expense for 41 roads	$2,768,740.00
(2) Annualized number of excess demurrage days	3,068,004.00
(3) Average cost per excess day	$0.9025

Replies.—In reply, proponents reiterate their views that the carrier opponents are exaggerating the costs of the program. BN states that if only 25 percent of its demurrage revenues were remitted, the administrative expenses would only amount to 4.23 percent of total demurrage charges. Private car owners, Duval Sales Corporation, Evans Products Company, International Minerals & Chemical Corporation (Duval), state that for 19 selected railroads the cost to remit the excess charges to private car owners for the period July 1 through December 31, 1973, is $134,376. When this is divided by the number of penalty demurrage days (184,950), the cost is 73 cents a day. Since the cost of administering the present demurrage program is $6 a day, the administrative cost is said to be more than adequately covered by the $10 to be retained by the delivering carrier.

ADEQUACY OF $10 MINIMUM

Private car and carrier proponents.—Private car and carrier proponents argue that the sum ($10) to be retained by the delivering carrier is adequate compensation to cover the administrative expenses of the rule, per diem, and the switching expenses associated with the delivery of the car.

Proponents state that the average per diem charge to be paid to owning railroads during periods of demurrage is approximately $4. Thus, the remaining $6 is arguably more than adequate to cover charges associated with the delivery of the car. They cite *Ormet Corp.* v. *Illinois Central R. Co.*, 341 I.C.C. 647 (1972), where the

Commission held that in providing relief from penalty demurrage charges, the delivering railroad should retain $4 per car per day to offset per diem plus 20 percent thereof for administrative costs. This expense, it is noted, falls far short of the $10 to be retained by the delivering carrier under the proposed rule. Moreover, this is especially true in cases where payments are made to private car owners since there are no per diem charges.

In cases where delivering carriers have shown per diem and switching charges in excess of $10, proponents note that it has not been established whether these costs are representative, or their percentage of the total number of cars involved. In addition, proponents contend that these costs should not be considered controlling in determining whether the $10 is adequate because the level of line-haul rates is set after considering per diem expenses and switching costs. Proponents state that it is a common practice to extend the line-haul car costs to include an average of 4 days at origin and 4 days at destination, citing "Rail Carload Cost Scales for 1973," ICC statement No. 1C1-73, p. 137. Proponents note that Rail Form A unit costs also include the added expenses incurred in switching cars to and from hold tracks. Therefore, proponents conclude, a carrier is compensated for its expenses by its division of the freight rate, and if any cost adjustment is needed, it should be in the line-haul rate.

Carrier opponents.—Opponents state that generally cars which incur demurrage in excess of $10 a day are those which have been constructively placed on railroad-owned tracks. Additional switching is necessary for these cars when (a) the delivering road moves the car to a holding point, (b) cars held at these points are repositioned as other cars move in and out, and (c) actual delivery is made. Additional costs are also incurred for track and protective services.

Opponents note that each additional switch is an added expense for the delivering road in terms of actual switching costs and administrative expenses necessary to record the position of the cars. For example, CMSP indicates 10 minutes of additional time is needed per switch—which costs $12.94. Such costs, carrier opponents maintain, will not be covered by the $10 to be retained by the delivering road.

The Boston and Maine (B&M) submitted a study of daily conditions and locations of cars for July 1973, to illustrate that switching costs are not covered by the retained $10. Out of 1,091 cars handled, 638 were identifiable as having excess demurrage. On hese cars there were 1,900 switching movements which would cost between $34.06 and $44.08 if they were intraplant or other than ntraplant secondary movements, respectively. Based on these igures, the switching costs would be between $64,714 and $74,233. But if the proposed remittance were in effect, B&M indicates that $56,865 would have been remitted to the car owner and, consequently, the B&M would have suffered a loss of over $10,000.

The ASLRA also argues that per diem expenses are not met by the retained amount. It submits that class II railroads normally are not accorded per diem reclaim by connecting carriers. Although, in theory, the short lines' division of the fixed arbitrary and terminal lines per diem reclaim allowance makes the switching and terminal lines whole for their per diem responsibility on backhaul cars interchanged with the trunklines, in fact, according to ASLRA, this is not so. ASLRA states that "shortfalls" can occur (1) when the holding line assesses a local revenue charge on shipments; (2) when there is a high turnaround of relatively low per diem equipment and low turnaround of higher rated equipment (a further discussion of this point is contained in the section on average agreements); and (3) when there are changes in patron volume, detention times, or equipment value.

Taking the average of the ASLRA study group carriers (except those not within the normal range indicated by the average for other railroads), demurrage retained exceeds per diem by only 22 cents per car handled. Of the 25 class II line-haul short lines in its study, ASLRA states that all but 2 would have net per diem costs exceed demurrage income by amounts ranging from 47 cents to $27.47. (See appendix A.) The statement presented by one of its members, the Meridian & Bigbee Railroad, submits that it presently collects in demurrage revenue only 15 percent of its per diem car costs on an annual basis. The proposed rule would, therefore, aggravate a presently critical situation.

Although opponents concede that demurrage is not considered a source of revenue, they argue that the money derived from demurrage is vital to offset additional operating costs which directly relate to the detention of equipment and car-hire costs during detention. Demurrage is also used to offset high-value equipment placed on assignment to delivering roads by car owners on which per diem rate exceeds the storage charge. The loss of this revenue, according to opponents, could force marginal lines into bankruptcy. Opponents conclude that the $10 to be retained by the delivering road is inadequate.

Replies.—Proponents reply that opponents of the rule have not established that, overall, the $10 to be retained by the delivering road is inadequate to meet costs.[13] However, in those limited instances where costs are not met by demurrage, it is maintained that the division of the line-haul rates should cover these costs.

Opponents continue to argue that costs incurred by the delivering railroad are not covered by the $10 portion of the demurrage charge. The ASLRA states that the minimum detention to the point of the first arbitrary day is 7 days. Thus, a carrier has 1 or more days of per diem before demurrage begins. Yet, no line-haul rate or division of rates contemplates covering costs for 7, 8, or 9 or more days of per diem responsibility before the assessment of demurrage for the first arbitrary days begins.

AVERAGE AGREEMENTS AND RUNAROUND CLAIMS

There is some question whether average agreements would be difficult or impossible to utilize under the proposed rule. In an average agreement, a shipper offsets the early release of a car (credit) against a late release (debit). Excess debits are then billed at $10 and arbitraries (which cannot be offset by credits) are billed according to the different level of charges on a monthly basis without regard to car ownership.

Private car and carrier proponents.—Proponents foresee no problems with average agreements. They contend that data for determining charges is available from existing average agreement forms since the car initial, number, and date placed and released are specified. Remittance is not affected by "free" and $10 days, but only days in excess of $10, and, therefore, the rule would have no adverse effect on average agreements. The UP proposed the following method of computing charges under the average agreement: chargeable days for average agreement multiplied by $10 equals the amount chargeable at $10 a day. Then the amount chargeable at $10 a day is divided by the number of debit days per average agreement to equal the amount apportionable to each car owner per each debit day.

Carrier opponents.—Rail carrier opponents, on the other hand, state that if the proposed rule goes into effect, average agreements will have to be canceled. They argue that under an average agreement if each credit has a value of $10 in offsetting debits, the delivering carrier could suffer a net loss when per diem and switching costs are not adequately covered by demurrage charges retained by the carrier. It is also contended that cars with high per diem can be used to offset low per diem cars, so that a delivering carrier cannot collect enough demurrage to offset the car costs of the high—value per diem equipment. For example, a $3.50 per diem charge for a coal hopper could offset a $22.88 per diem charge for a 60-foot boxcar.

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[13] The Norfolk and Western Railway Company in its reply states that if remittance is ordered, then the $10 limit should not be altered to reflect added switching expenses as these are covered in the Rail Form A unit costs.

Examples of the problems created by average agreements were cited by the SEDSB. If each credit has a value of $10 in the offsetting of debits, it states that an anomalous situation would develop. On one average agreement, reflecting a total of 64 cars, $900 in demurrage charges were assessed, with $240 representing possible pay out to foreign railroads. Yet, there would be per diem and switching charges of $845.09, so that the delivering carrier would suffer a net loss of $185.09. In another instance, an average agreement covering 231 cars involved total demurrage charges of $4,770 with related costs of $6,366.11. Under the proposal $900 would be remitted to the car owners.

Opponents also contend that the purpose of the rule would be thwarted by "runaround" claims. Runaround occurs when newly arrived cars are placed for unloading before previously arrived cars held under constructive placement. A runaround claim lists all cars in the order of arrival and constructive placement dates. The placement date of the first cars is then substituted for the date of the first constructively placed car and demurrage is recalculated on the basis of substituted dates. Therefore, the owner whose car was actually detained might not receive the penalty charge. Similar situations assertedly would result in claims for bunching, weather interference, and frozen or congealed lading.

Members of the PCDB also suggest that consideration be given to delaying the remittance of the excess charges under average agreements for a period of 6 months to review for correctness and to minimize the handling of monies between the carriers.

Replies.—Proponents deny that there will be any problem with average agreements since debits, credits, and free days are not in issue because such matters affect unchargeable days before penalty demurrage commences. BN also states that runaround and bunching problems are resolvable and will be minimized by identifying car-ownership under this proposal.

CLAIM PROBLEMS

Private car and carrier proponents.—Proponents also foresee no problem with claims by a shipper against a railroad for excessive charges already paid as this is said to rarely occur. However, if the carriers desire protection against car owner bankruptcy, a bond could be posted by the car owners. In other instances, if there is a valid claim, the delivering road could withhold future payments to the car owner until the appropriate amount is accounted for.

Carrier opponents.—Carrier opponents state that they should be protected against claims for demurrage charges paid and remitted which are not applicable. They also submit that the threat of a lawsuit may force them to drop a claim which they might otherwise file lest the cost of the suit deplete or exceed the demurrage charges that the delivering road would be entitled to under the rule.

LEASES

In the interim report, the Commission determined that in a lease situation, the lessee of the car should be considered the owner. Both proponents and opponents contend, however, that the only practical approach in leasing arrangements is for the delivering road to remit the excess charges to the lessor or owner of the reporting marks (those marks assigned to cars by the AAR), as is currently done with mileage allowances.[14] The lessor and lessee could adjust the lease to take into account the remittance to the lessor. The burden of recordkeeping would then be on the car-owning company

Allied Mills[15] states that if any controls are necessary in lease situations, ones similar to those imposed under the mileage rules should be used. This would prohibit the car line from refunding to the lessee demurrage charges in excess of the rental expenses to the private car lines.

REMITTANCE TO PRIVATE CAR OWNERS AND EARMARKING

Private car and carrier proponents.—Private car proponents stress that they should be included within the proposed rule, a conclusion already reached in the interim report. They argue that they are the ones damaged by the detention of their equipment and are, therefore, entitled to be compensated. To hold otherwise, assertedly, would be discriminatory.

It is also contended that private car owners are supplying an ever-increasing proportion of the Nation's freight cars (between 1972 and

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[14] Hercules, Inc., asks that the Commission determine when the free time begins on trip-lease cars.

[15] Allied Mills states that the Commission was incorrect in its interim report in stating that Allied Mills favored remittance of all demurrage charges. It only favors remittance of charges in excess of $10 per car per day.

1974 private car owners and shippers added 35,711 cars to the transportation system), while carriers who have not increased their car supply are reaping the benefits of the investments of others by retaining excess demurrage charges. Archer Daniels Midland shows that the national car fleet expanded (primarily because of private investment) from the years 1972 to 1974 by a total of 3,636 cars; however, the carrier fleet decreased by 32,075 cars. Such a significant portion of the investors in freight cars, it is argued, cannot and should not be excluded from benefiting from the proposed remittance scheme.

Carrier opponents.—Some carrier opponents contend that the Commission will err in extending the rule to private car or lessor/lessee owners (which as already noted was found appropriate in the interim report). They argue that private and carrier car owners have traditionally been treated differently by the Commission and that no justification has been presented in this proceeding for disregarding that distinction. They note that railroads have the responsibility of furnishing cars, and, thus, alone are entitled to retain excess demurrage charges. They also argue that the funds should not be remitted to the private car owners because they have not invested in cars which are in short supply, but rather in cars that are in surplus, such as tank cars and covered hoppers. The BN (a proponent of the rule in other respects) also fears that if private car owners are included, it would be counterproductive for they will have less of an incentive to release cars on time since they themselves would receive the excess demurrage charges. Lastly, the AAR argues that remittance of the charges to private owners is an unlawful rebate in violation of section 15(13) of the act which requires that payments to car owners not exceed reasonable costs.

Replies.—In reply to the allegations that the remittance to private car owners violates section 15(13), Bay State Milling Company argues that the statute applies to "excess allowances from railroad funds for railroad services performed by the shipper." As the proposed rule applies to the disposition of excess demurrage charges paid, section 15(13) is argued to be inapplicable.

If a remittance is allowed to private car owners, the AAR urges a downward adjustment in car-mileage payments and that the funds be earmarked for purposes beneficial to railroads and shippers alike, such as research and development in freight car design.

Earmarking.—In all other respects, opponents and proponents of the rule agree that there should be no earmarking of funds. Private car owners point out that there is no law which requires parties, other than common carriers by railroad, to purchase and supply railroad freight cars, and, therefore, that there is no statutory basis for earmarking of funds.

Participants also agree that earmarking would not be in the best interest of car owners. They foresee policing problems and questions as to whether it may be feasible or necessary for car owners to purchase additional cars with the fund. Forced acquisition, the carriers claim, would also distort car investment which takes into consideration factors such as freight and car-hire revenue. As in *Demurrage Rules and Charges Nationwide,* 340 I.C.C. 83, 90 (1971), it is argued that earmarking be found unwarranted.

CAR UTILIZATION AND SUPPLY

Private car and carrier proponents.—Even though they believe funds should not be earmarked for the purchase of additional cars, proponents contend that general economic principles dictate that if car owners are compensated for being deprived of their freight cars, their incentive to purchase cars will be stimulated. They agree that the Commission was correct in holding in the interim report that the proposed rule will have a positive impact on car supply.[16]

Carrier opponents.—Carrier opponents, on the other hand, argue that the proposed rule will not increase freight car supply. They argue that the additional purchase of freight cars may be curtailed as funds once available to the delivering road will now be consumed by the administrative costs of the program or be totally lost when remitted. They further contend that the loss of these demurrage funds (there is no increase in the charge to offset the loss), will have a serious impact on roads experiencing financial difficulties. (The ASLRA states that its 1973 study group derived 3.5 percent of their gross revenue, 7.6 percent exclusive of local traffic, from arbitrary demurrage.) It is also suggested that the rule might discourage the collection of demurrage charges and decrease car utilization since the rule only applies to charges actually collected and not billable demurrage. This would, in turn, have a detrimental effect on the shippers' incentive to release cars quickly.[17]

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[16] A number of private car proponents did not state whether they thought the rule would increase car utilization and supply. However, they stated that if the rule was warranted, its application should be extended to private car owners.

[17] Carriers argue that there is no indication in the present record that presently large sums of demurrage remain uncollected or that carriers can or have the ability to influence a shipper to detain cars longer than necessary.

Carriers submitted data showing the amount of demurrage charges to be remitted to carrier and private car owners. Generally the study period was July 1 through December 31, 1973. Participants agree that this test period does not accurately reflect the amount of demurrage normally chargeable, for during this period Car Service Order No. 1124 was in effect for approximately 91.69 percent of all cars. It is estimated that Service Order No. 1124 inflated the amount of demurrage subject to remittance by as much as 53 percent for the N&W; 67.55 percent for AAR member roads; and 55 percent for the Penn Central. It is, therefore, argued that the amount to be remitted when compared to the administrative costs of the rule does not justify the proposal.

Appendix B shows the amount of demurrage to be remitted between various roads, and appendix C shows the amount to be remitted to specified private car owners by certain selected roads. Since not all railroads participated in this proceeding and since the reporting roads generally did not know how much demurrage would be received from other roads under the rule, it cannot be determined what the total amount remitted compared to the total amount received by a particular road would be. However, based on the data submitted by reporting roads for the last half of 1973, the amount of demurrage to be remitted can be estimated. The following table is our summary of these amounts as reported by 42 reporting roads. (See appendix D.)

TABLE 5

Amounts of demurrage payable to foreign railroads and private car owners, assuming the proposed remittance rule had been in effect during the July 1 through December 31, 1973, study period and the number of demurrage days reflected by these amounts

(1) Total amount of demurrage payable to foreign railroads, assuming the rule had been in effect during the study period	$37,752,616
(2) Total number of demurrage days reflected in line 1	1,650,127
(3) Average amount payable to foreign railroads per demurrage day	$22.88
(4) Total amount of demurrage payable to private car owners assuming the rule had been in effect during the study period	$2,634,839
(5) Total number of demurrage days reflected in line 4	122,579
(6) Average amount payable to private car owners per demurrage day	$21.50

Opponents contend that the amount to be remitted to the car owner would not affect decisions to purchase additional cars. The SP, for example, states that demurrage revenues are too insignificant and too unpredictable to influence a decision of whether additional equipment is needed. Demurrage accounts for less than 2 percent of its freight revenues (or only 1 percent of car-hire revenues). SP states that based on its demurrage revenues in 1974, it received $250 per car. If the excess amount remitted were an additional 25 percent, this would only be $62.50 more, and represents less than 2 percent of its threshold revenue requirement of at least a 10-percent return on investment after taxes.

Lastly, opponents argue that car owners, although given the opportunity to commit themselves to purchase additional cars, have failed to do so, which is said to seriously put into question the Commission's conclusion that the Nation's car supply will actually increase. CRANDIC suggests that a more direct and less expensive way to solve the car shortage problem would be to reduce the amount of free time, do away with average agreements, and implement detention charges for storage of empty private cars.

Replies.—AAR answers that even if all the money remitted to private car owners was used to purchase additional cars, this would only amount to between $21 million and $26 million (based on a 50- to 60-percent reduction of actual demurrage charges payable for the 6-month 1973 base period to account for Service Order No. 1124). At $35,000 a car only 75 additional cars could be purchased, which would not appreciably increase car supply. Moreover, there is no guarantee that the money remitted will be used for this purpose. Because of such a limited impact and the assertedly high cost of administering the rule, AAR concludes that its adoption is not warranted.

DISCUSSION AND CONCLUSIONS

As stated in the interim report, in order to adopt the proposal, we must be satisfied that the rule will achieve its intended purpose of increasing car supply and utilization, will be administratively feasible, and the benefits of the rule will outweigh the expenses incurred in its implementation. We have previously discussed in the interim report the positive impact the rule will have on car utilization and supply, and, therefore, a detailed discussion of our conclusions is not necessary, although we would like to reemphasize some conclusions we reached therein.

First, inadequacy of car supply has been a recurring problem in the Nation's carrier fleet. Congress has specifically recognized the problem and amended section 1(6) of the act to insure that an adequate car supply is maintained. While the Commission has taken numerous steps to alleviate car shortages by increasing incentive per diem, shortening the length of free time, and issuing car service orders in addition to other innovations in this area, the problem remains. The proposed rule, we believe, will contribute to the Commission's continuing policy of encouraging the maintenance of an adequate freight car supply.

Carrier opponents argue that there is no guarantee that the amount of money to be remitted will be utilized by carrier or private car owners to purchase additional cars because, indeed, there has been no commitment to do so by these parties. However, this argument overlooks the fundamental economic proposition that a greater return on an investment will provide an increased incentive to invest in that item, whether it be stocks, land, or as in this case, freight cars. Return on investment may not be the sole factor in determining whether an investment in freight cars is made, but its influence cannot be disregarded.

As demurrage regulations presently exist, the delivering carrier, who may not own one freight car, is nevertheless entitled to the entire demurrage charge even though this sum may far exceed any costs incurred. In addition, there is no indication that this demurrage revenue is presently being used by the delivering road to purchase additional cars. This money is, therefore, a bonus to a carrier who has no interest in whether or not a car is being detained. However, the car owner, whether private or foreign road, has its equipment detained and unavailable for further use, and thereby loses revenue. This is especially true of private car owners who do not receive per diem but a mileage allowance. This remitted amount which table 5 shows is approximately $22 for each excess day ($11 if it is assumed that Service Order No. 1124 inflated demurrage by 50 percent), which SP estimates to be approximately $62.50 a car annually, will be an added dividend to car owners. When these figures are multiplied by the vast number of cars in the transportation system, the rule will certaininly have a significant positive impact on car supply.

Administrative expenses.—Those opposing the rule have argued that the costs of its administration far outweigh any benefit that can be derived from its implementation. However, the evidence of record fails to support this contention.

Carriers presently require sufficient information in their present demurrage forms to calculate the demurrage charges in excess of $10 a day. It has been adequately demonstrated that the rule is feasible from a recordkeeping and administrative viewpoint with employees or computers drawing the necessary information from existing or slightly modified demurrage forms. In addition, if demurrage bureaus are utilized, the implementation of the rule would be simplified, as there presently exists a framework for tabulating demurrage and auditing records.

Costs, of course, will be incurred in implementing and administering the rule; but it has not been shown that these costs will be excessive. Where a carrier data shows high implementation costs, such costs in many instances are attributable to instituting a computer system where none previously existed or to hiring additional employees to do the computation on a manual basis. However, a large portion of the data on implementation costs does not specify whether the estimated costs (both startup and annual) would be incurred if demurrage bureaus were used, or if the costs are individual expenses in addition to the prorated charges of the bureaus. Costs not based on the use of demurrage bureaus, where expenses would be significantly less than an individual's expenses, significantly inflate the costs to implement and administer the rule, and thus, appear to overstate the actual amount needed.

Indeed, it has been clearly shown that demurrage bureaus can significantly cut the costs of administering the remittance scheme by economies of operation since, in most instances, the existing staff, machinery, and facilities, with slight modification, can be used to implement the proposal. Based on the data submitted by the three reporting bureaus, startup and annual expenses for administering the rule for 183 members would be $30,439 and $692,985, respectively. Using data submitted by members of the PCDB, annual and startup costs for each "excess" day, would be $0.251 and $0.035, respectively. These figures, we believe, more accurately indicate the costs of the proposed remittance scheme if demurrage bureaus are used, although we realize that carrier members may have certain expenses in addition to those of the bureaus.

In conclusion, we realize that the cost data submitted by many of the reporting roads is inflated and that many of the expenses are unsubstantiated. (For example, a carrier states that it needs four additional employees but it does not indicate how it arrived at this figure.) However, despite our reservations as to the accuracy of the cost data presented, even taking it at face value, we are nevertheless unable to find that the costs of administering the rule are excessive. As can be seen from table 4, average startup expenses of $14,219 and annual expenses of approximately $0.90 for each excess demurrage day are not unreasonable, unjustifiable, or unduly burdensome. Even if expenses were slightly higher, the evidence of record still supports the finding that the costs of administering the rule are not prohibitive.

The record also indicates that in terms of cost-benefit, the proposed rule is justified. Table 5 shows that the total amount of demurrage that would have been remitted for the period July 1 through December 31, 1973, to private and foreign car owners by 42 roads is $40,387,455. Even if we discount the effects of Service Order No. 1124, which inflated this figure by an estimated 50 percent, $20,193,727 would still have been remitted to car owners during this 6-month period. This discounted amount would constitute between a $10 and $11 return on a car owner's investment for each excess demurrage day. When this amount is compared to the costs of administering the rule, it becomes evident that the costs are not so burdensome as to outweigh the rule's benefit in providing an incentive for the purchase of additional equipment and, thereby, in increasing car supply.

Inadequacy of amount.—It has been contended by some carrier opponents, especially the ASLRA, that the $10 to be retained by the delivering road is insufficient to meet delivering carrier costs (per diem, switching, and administrative expenses).

The switching costs are reflected in the line-haul rate by Rail Form A's unit costs. These figures are based on average costs for a particular region and are used to calculate the switching costs associated with line-haul movements. Per diem expenses are also used in computing the line-haul rate. Therefore, it is incorrect to assume that the $10 to be retained by the delivering roads is the only source of revenue available to cover switching costs and per diem expenses. Since the evidence indicates that these costs in certain instances are not presently recoverable from demurrage charges (although it is not clear whether the expenses are covered by other revenue), an adjustment in the reclaim allowance, switching charge, or division of rates may be needed.[18] Then, if it can be shown that the costs of the delivering railroad are not consistently being met.

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[18] Notice is taken of Rule 5, Code of Car Hire Rules and Interpretations-Freight, "The Official Railway Equipment Register," Vol. 92, No. 1 (July 1976). It provides that

> (a) An amount (Note 1) for each loaded car handled in Terminal Switching Service except as otherwise provided in paragraph (b) may be reclaimed by each individual switching road from

(footnote continued on next page)

the carrier is free at any time to seek increases in applicable rates and charges.

The adequacy of demurrage is not in issue in this proceeding. If any carrier can demonstrate that its costs (per diem, switching, and administrative expenses) are not being met, the proper recourse is to petition the Commission to increase the amount of basic demurrage or other appropriate rate or charge. A deficiency in basic demurrage, switching charges, or other rate or charge, should not be offset by revenue from penalty demurrage. To do so would vitiate the incentive element of arbitrary demurrage and also, as noted in the interim report, deprives the car owner of part of the return on his investment. In the event that basic demurrage would be increased in excess of $10, these rules would be adjusted accordingly to provide that the car owners would receive the demurrage in excess of the higher level of basic demurrage.

Average agreements and claims.—We do not feel that average agreements present the problem that the railroads have envisioned. The proposed rule only affects demurrage in excess of $10. Under present average agreements a credit of $10 is used to offset a debit of $10, and therefore, the delivering carrier will not receive any demurrage on a haul where no arbitrary demurrage is assessed. This will not be changed. The rule provides that the delivering carrier shall retain $10 of the charges collected, the demurrage in excess of the $10 debit up to $10 will be retained by the delivering road. Therefore, the rule will have no adverse impact on average agreements since (1) carriers presently receive no compensation for debit days which are offset by credit days, and (2) the delivering road, as in other situations, will retain up to $10 for arbitrary days which has been found to be sufficient to cover costs. It has not been sufficiently shown that a carrier's costs would not be met by the sum to be retained ($10) under average agreement. However, as in the case of our discussion of switching and other administrative costs, if it can be established that costs are not being met, the carrier can seek relief from the Commission to retain a greater amount.

(footnote 18 continued)

the road for which the service was performed. In determining the amount, an average number of days not to exceed five (5) shall be used. The average number of days shall be determined annually, or at such other periods as may be agreed upon by the interested roads, by an examination of the records (Note 2) of each individual switching road for each local territory. However, on the request of the majority of the interested roads in any local territory, the settlement of terminal switching reclaims will be on the basis of actual time involved in handling of cars during the month for which reclaim is made subject to a maximum of (8) days on any one car and the maximum average of five (5) days per car.

Note 1.—The word "amount" as used in this rule shall be the product of (1) average time established as an arbitrary, or actual time, subject to maximums provided in this Rule, and (2) the actual car hire rate on each car handled in switching service.

We would like to make a suggestion to those who argue that average agreements are not feasible because high per diem cars can be used to offset low per diem cars and, therefore, costs will not be covered by the $10 to be retained by the delivering carrier. The per diem charge is based on numerous factors including the cost of equipment and its relative supply in the marketplace. To increase car supply and utilization, the carriers could provide that a credit and debit will not offset each other unless the per diem charges are relatively similar, i.e., within a range of 20 percent or some other figure. This would prohibit the offsetting of a $3.50 coal car with a $22.88 60-foot boxcar. This avenue of compromise should be explored before carriers consider implementing their threats to terminate average agreements.

Another area of expressed concern is that of runarounds. We feel that respondents can devise a method of dealing with this situation in order to fulfill the purposes of the rule in compensating an owner whose car is actually detained. Under the present demurrage system, no problem is presented because the delivering carrier keeps all demurrage, and hence no provisions are presently necessary. However, this does not mean that a solution does not exist. For example, in runaround situations, the amount to be remitted to each car owner could be determined as follows:

Total chargeable demurrage—($10 x total days all cars subject to runaround are held) ÷ Amount to be remitted to car owners

$$\frac{\text{Amount to be remitted}}{\text{Number of days cars held}} = \text{amount per day}$$

This amount multiplied by the number of days the car was held would determine what amount is to be remitted to each car owner.[19]

Claims.—Next we will discuss the argument that claims against shippers for demurrage charges in some cases may not be pursued where legal fees for collecting these claims exceed the amount to be retained by the delivering road.

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[19] For example: Car owned by X was constructively placed on day 1, car owned by Y constructively placed on day 2, and car owned by Z placed day 3. Car X is released day 6, Car Y released day 5, and Car Z released day 4. Demurrage is computed at $10 the first day, $20 the second, and $30 thereafter. In a runaround situation, the released dates on later-placed cars will be substituted for those of earlier placed cars. The total amount of demurrage that could be assessed under the runaround claim is $180. The total number of days held by all cars is 9 days. Therefore, the delivering carrier would subtract $90 as the amount it would retain. The remaining $90 would then be divided by the number of days the cars were actually held (9) to get the amount per day of $10. This multiplied by the days each car was held would give us the amount to be remitted to each owner. $50 to X, $30 to Y, and $10 to Z.

See section 1, rule 8, section E note 1 of the Demurrage Tariff 4-J, ICC H-59, for a thorough analysis and computation of demurrage in a runaround claim.

In addressing this contention we note that a carrier is under a legal obligation to collect demurrage charges properly assessed, and the implementation of this rule does not relieve a carrier of this duty. However, only a small percentage of claims are contested, and expenses incurred in pursuing these claims would generally be recoverable from the $10 to be retained by the delivering road. It is also noted that demurrage bureaus handle claims and prorate the costs to their members so that the cost burden is shared by a number of carriers. We, therefore, conclude that legal expenses incurred in collecting demurrage charges would not be a problem under the proposed remittance scheme. If, however, it can be shown as stated above, that costs are not being met, a carrier can seek relief from the Commission to retain a higher amount.

In situations where (a) a carrier has received demurrage charges from the shipper and has remitted this amount to the owner, and (b) it is later determined that the charges were in fact not applicable or otherwise lawfully due, then the carrier can seek direct reimbursement from the car owner or withhold forthcoming remittances until the amount is satisfied. The best method of solving this problem can best be determined, however, by the respondents themselves.

Private car owners.—The interim report concluded that the proposed remittance rule should also apply to private car owners. This determination was sound. An increasing percentage of the Nation's carrier fleet is owned by private interests. The evidence shows that between 1972 and 1974 private car owners and shippers added 35,711 cars to the transportation system. These investors should receive a fair return on their investment as well as carriers. Some proponents note that private car owners have made investments in freight cars without the rule and may continue to do so, if the proposed rule is not implemented. While this may be true, it is an unconvincing argument for concluding that, therefore, no additional incentive is needed. Indeed, such investments may have been much greater if the incentive heretofore had been in effect.

For those who argue that the remittance would be an unlawful rebate, we reiterate our position stated in the interim report (349 I.C.C. 411, 438), that rebates are not involved because the delivering carrier will receive its full rate and compensation for all demurrage charges and will merely remit the excess to the car owner.

In the interim report we concluded that the remittance in lease ituations should be paid to the lessee. Although the Commission as held that the lessee is the car owner in considering other emurrage questions (see *Car Demurrage Rules, Nationwide*, 350 .C.C. 777 (1975)), we feel that under the proposed rule it would enerally be more efficient and administratively practical to have he excess demurrage remitted to the lessor as is done with the nileage allowance. The administrative costs would then be incurred y the lessor in determining what amount if any, should be remitted o the lessee. Existing demurrage rules as to when "free time" begins or as the lease agreement otherwise specified) would be controlling n determining when demurrage begins.

However, in a long-term lease of equipment by a private car wner to a railroad, the lessee should be considered the car owner s proposed in the interim report. This would simplify the dministration of the rule, for the reporting marks on the car would e that of the lessee, and the delivering carrier would not be aware f the identity of the lessor, or if in fact, the car is leased.

We believe, however, that restrictions on the amounts to be emitted to private car owners are necessary to encourage and not iscourage the timely release of equipment. For example, assume rivate car owner X is the consignee or consignor of a car on which xcess demurrage accrues because of causes attributable to X. (This ould occur when there is congestion on X's track, or when there re no private tracks and the car is held on carrier track.) X would ay the delivering carrier the demurrage charges and any excess emurrage would then ultimately be remitted to the car owner, X. herefore, X would only pay $10 per car per day and no penalty or rbitrary charge. This would nullify the incentive to release quickly he car which is provided by the penalty portion of the demurrage harge.

To correct this situation, the proposed rule will be modified as ollows:[20]

> (c) Excess demurrage shall not be remitted to a private car owner who for reasons ttributable to the car owner causes the accrual of the excess charge. The excess mount, which would otherwise be remitted under the rule, shall in these situations be etained by the delivering carrier.

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[20] Leases can provide for an adjustment if the demurrage is caused by reasons attributable to the ssor or lessee.

In determining if the excess demurrage is caused by reasons attributable to the car owner, this provision shall be interpreted and applied in accordance with demurrage rules and principles.

Earmarking.—Lastly, we conclude that no restrictions should be placed on the use of the funds to be remitted to car owners, either private or foreign roads. It would be difficult to force a car owner to purchase additional equipment, and to supervise and administer such a provision. The proposed remittance is a sufficient incentive to the purchase of additional cars without putting an absolute limit on the use of the remitted funds.

Upon consideration of the record, we conclude that adoption of the proposed rule, as amended, which is set forth below, would be in the public interest, is reasonable and otherwise lawful to "the maintenance of an adequate freight car supply" as required by section 1(6) of the act.

> (a) Except as otherwise provided hereinafter, the nonowning railroad, on whose lines a car is being detained under demurrage, shall remit to the freight car owner, all demurrage charges collected in excess of $10 per car per day.
>
> (b) That under this rule, for the purpose of determining the car owner in the lease of a freight car, the car owner will be the lessor; except that in cases where there is no notice of the identity of the lessor, the lessee shall be considered as the car owner.
>
> (c) Excess demurrage shall not be remitted to a private car owner who for reasons attributable to the car owner causes the accrual of the excess charge. The excess amount, which would otherwise be remitted under the rule, shall in these situations, be retained by the delivering carrier.

FINDINGS

We find:

(1) That the Commission has jurisdiction under section 1(6) of the act, as amended, and under its car service powers to consider the proposed demurrage remittance rule;

(2) That the proposed remittance to the freight car owner, except as restricted hereinafter, by a nonowning railroad, on whose lines a car is being detained under demurrage, of all demurrage charges collected in excess of $10 per car per day, is just, reasonable, and otherwise lawful;

(3) That under this rule, for the purpose of determining the car owner in the lease of a freight car, the car owner will be the lessor; except that in cases where there is no notice of the identity of the lessor, the lessee shall be considered as the car owner;

(4) That excess demurrage shall not be remitted to a private car owner who causes the accrual of that excess charge, but such amount shall be retained by the delivering carrier;

(5) That this decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

An appropriate order will be entered.

COMMISSIONER MURPHY, concurring in part, dissenting in part:

I am in agreement with the majority to the extent that it would promulgate regulations embodying the proposed remittance of demurrage charges as between regulated common carriers by railroad. The implementation of that long-delayed program first conceived in 1972 should result in a marked improvement in freight car supply and utilization not only to the carriers but also to the shipping public. As such, it is another small step in this Commission's endeavors to improve the Nation's freight car supply. It is readily apparent that all problems relating to car supply cannot be resolved at one time or in one proceeding. See, in this connection, *Maintenance of Records Pertaining to Demurrage*, 352 I.C.C. 739, 793-794. Nevertheless, it is regrettable that this program was so unduly delayed. Undoubtedly, if the regulations were in effect, even on an interim basis, the several severe car shortages occurring subsequent to publication of the proposal would surely have been eliminated or ameliorated.

Turning next to the proposed extension of the remittance program to private car owners, the majority's decision aptly points to the many incipient problems awaiting that aspect of the proposal. A review of the record clearly shows that the private car owners actually contributed little to the resolution of this proceeding. And the majority tacitly acknowledges that deficiency by its recognition that the private car owners can only be included in the program by consideration of the evidence submitted by the railroads. In my separate expression, *Remittance of Demurrage Charges*, 349 I.C.C. 411, 444, I recognized such a distinct possibility and urged that the parties, including private car owners, be made aware of the need to furnish adequate data.

With respect to private cars, it is unclear as to who, the lessor or lessee, should or will receive the remittance. The extension of the program to private car owners will provide an opportunity for rebating or undue prejudice. Ideally, the private car owner, the lessor, should assume its recognized responsibilities by the proper placarding of its car or by meeting the other requirements of the demurrage tariffs so that where the car is actually on the private tracks of the lessee the railroads will not be concerned with demurrage collection or other related problems.

Where the private car is held on railroad tracks at destination for lessee's purposes, then any resulting demurrage on the private car over $10 per day should be retained by the destination carrier. The railroads should not be required to act as a collection agency for the lessor of the private car without some form of compensation for those additional duties. Cf., the tariff provisions applying on c.o.d. services. As between railroads, the situation is different since they must settle among themselves the apportionment of revenues and payment of various costs or charges incurred in performing a transportation service.

The majority also implies that the railroad can offset erroneously remitted demurrage to private car owners by a deduction from future accounts. Whether that procedure is legally sound has not been adequately explained. Cf., the transit tariffs and procedures thereunder and 49 U.S.C. 66 applying on Government traffic.

To the extent that the majority's decision differs from the views expressed above, I respectfully dissent therefrom.

Commissioner Christian, whom Commissioner MacFarland joins, dissenting:

I do not believe that the public benefits envisioned by the majority will materialize when the proposed rule is adopted.

The report foresees increased car utilization. However, with demurrage charges unchanged, I see no reason for a delinquent car user to change its habits. The proposed rule provides no incentive for a user to release cars held beyond free time.

The report foresees an improved car supply. It assumes that the demurrage charges remitted to the car owner will be used for car purchases. It also assumes that this minor increment in a car owner's return will influence future investment decisions. The report contains no economic analysis to support these assumptions, and in my opinion the available evidence appears to contradict these assumptions.

The cost of the program does not seem to justify the sole benefit of returning additional monies to the car owner. I do not think we should take an isolated action affecting freight car compensation when we know that the incentive per diem program, the mainstay of Commission efforts in this area, is currently being reevaluated. I believe that DOT is correct in suggesting a complete reassessment by the Commission of all rules governing freight car distribution and utilization rather than taking a narrow, disjointed action here.

Commissioners Hardin and Gresham did not participate.

APPENDIX A

ASLRA study group data showing the relationship of demurrage to per diem

Railroad	Number of cars	Demurrage	Net per diem	Demurrage	
				After XP 289	Over/under net per diem[1]
		Class I S&T			
PBR[2]	151,563	$1.50	[3]$0.35	$0.99	$0.64
SB	91,709	2.89	0.73	1.94	1.21
PBNE	75,123	1.90	0.48	1.30	0.82
CBL	72,559	1.46	1.45	1.15	(0.30)
ALQS	70,024	11.38	2.11	6.26	4.15
LT	53,981	4.56	1.78	3.52	1.74
BS	50,712	0.89	3.03	0.55	(2.48)
MCRR	35,255	20.36	4.48	10.98	6.50
RT	30,351	2.42	3.86	1.96	(1.90)
CUVA	21,609	18.08	3.34	10.47	7.13
		Class II S&T			
MKC	20,446	11.66	5.02	6.20	1.18
DC	20,377	3.40	6.51	3.05	(3.46)
UMP	17,542	7.56	2.98	2.79	(0.19)
NSS	16,329	2.75	3.97	1.79	(2.18)
CTN	10,233	6.48	1.71	3.57	1.86
POV	7,512	1.66	(1.36)	1.40	2.76
WYT	5,316	17.82	5.41	6.63	1.22
MET	5,300	0.59	4.11	0.45	(3.66)
JSC	3,522	4.40	1.18	2.86	1.68
MJ	1,047	78.19	16.93	34.99	18.06
EEC	555	66.72	13.08	27.01	13.93
TN	28,925	8.83	4.48	4.67	0.19
CIC	7,424	19.61	12.91	13.18	0.27
GNWR	6,717	0.35	2.36	0.35	(2.01)
NLG	3,508	9.06	23.96	5.57	(18.39)
APA	3,390	2.46	11.73	1.19	(10.54)
SRN	3,089	6.25	9.13	4.33	(4.80)
EACH	2,193	0.15	4.08	0.14	(3.94)
LRS	2,045	2.98	5.93	1.37	(4.56)
LEF	1,987	1.02	8.00	0.66	(7.34)
LNW	1,816	1.44	28.61	1.14	(27.47)
VSO	1,664	3.43	11.80	1.83	(9.97)
CHV	1,474	5.07	9.26	2.67	(6.59)
DR	1,143	5.26	18.67	3.43	(15.24)
ME	867	3.23	26.54	3.03	(23.51)
VCY	843	1.58	9.29	1.13	(8.16)
IAT	807	10.30	12.33	6.83	(5.50)
GRN	725	1.10	6.62	0.98	(5.64)
BML	668	4.97	26.88	2.92	(23.96)
MCSA	592	0.96	2.07	0.93	(1.14)

APPENDIX A—Continued

ASLRA study group data showing the relationship of demurrage to per diem—Continued

Railroad	Number of cars	Demurrage	Net per diem	Demurrage	
				After XP 289	Over/under net per diem[1]
Class II S&I—Continued					
NB	533	----------	4.86	----------	(4.86)
CLCO	391	4.63	3.46	2.99	(0.47)
MB	310	0.06	5.73	0.03	(5.70)
FCIN	259	7.34	21.72	5.98	(15.74)
FJG	223	52.83	25.38	22.06	(3.32)
CLIF	139	10.43	7.50	6.47	(1.03)

[1] Net per diem is gross per diem including mileage, less per diem reclaim where applicable.

[2] For the alphabetical designations assigned by the Accounting Division of the Association of American Railroads and used in column A of pages 2 and 3 of this exhibit and elsewhere in ASLRA exhibits, the full railroad names are given in [ASLRA] appendix A. E.g., ALQS is the alphabetical designation for Aliquippa and Southern Railroad Company.

[3] ASLRA in its reply statement, submits that nonincentive per diem has increased by 12 percent from the time this chart was compiled, and therefore, the per diem deficits are understated by 12 percent.

APPENDIX B

Remittance of excess demurrage to foreign roads

Amount payable to foreign roads during test period of July 1, 1973 through December 31, 1973	ATSF	BN	CNW	CRIP	CO	D&RGW	FEC	ICG	MP	N&W	PC	SCL	SOU	SP	UP	Total amount payable to all foreign roads
Atchison T. & S.F.		$114,637	$30,650	$45,133	$24,270	$25,481	$10	$42,746	$88,385	$42,501	$98,680	$18,730	$45,400	$114,909	$113,340	$1,222,611
Burlington Northern	358,080		96,980	37,380	33,250	20,960		49,653	57,360	61,100	47,750	25,240	37,230	43,930	102,230	1,058,210
Chicago North Western	63,381	275,560		40,974	84,410	7,080		75,320	58,610	59,910	219,980		68,240	34,189	85,479	1,601,792
Chicago Rock I. & Pacific	No information presented by CRIP															
Chessie System[1]	147,405	148,508	74,940	63,340	468,429	9,699	40	131,209	101,983	250,460	591,370	108,400	268,225	92,230	111,389	3,586,354
Denver & Rio Grande Western	No information presented by D&RGW															
Florida East Coast	2,900	5,490	760	3,980	9,020	160		25,870	3,330	3,290	13,050	38,660	56,110	3,620	2,140	214,520
Illinois Central Gulf	137,022	92,133	190,150	49,180	23,410	3,090	40		121,945	77,410	85,051	42,060	100,400	40,760	49,560	1,622,377
Missouri Pacific[3]	246,354	17,660	53,470	88,730	55,425	12,070		63,340	142,485	55,800	90,930	33,170	84,365	66,975	91,490	1,953,404
Norfolk & Western	36,046	93,824	56,860		145,290	5,101		43,560	47,380		180,796	350	64,030	55,412	72,024	1,299,523
Penn Central*	225,570	176,360	254,770	136,340	576,410	37,070	80	242,100	265,020	629,280		275,870	601,650	226,160	262,480	7,879,450
Seaboard Coast Line	75,743	80,441	32,001	22,810	79,060	4,122	2,850	179,824	52,865	91,815	118,142		415,658	61,202	31,132	1,817,140
Southern Ry.	50,694	87,490	35,860	35,525	179,515	3,260	170	141,215	114,041	93,205	174,255	217,243		62,920	40,382	1,235,975
Southern Pacific	276,900	136,450	24,180	25,630	26,740	17,390		82,550	77,120	35,060	72,270	17,290	38,370	295,830		1,505,385
Union Pacific	30	28,330	7,710	3,760	3,260	8,080		5,890	15,420	4,760	5,420	1,870	6,740	44,550		260,600
*If no service order had been in effect during the test period the amount to be remitted by PC would be as follows:																
	93,670	137,400	95,740	52,210	229,370	16,250	20	86,290	100,400	257,600		92,710	223,930	105,420	110,560	

[1] The Chessie System includes the Chesapeake & Ohio, the Baltimore and Ohio Staten Island Corp. and Western Maryland Ry.

[2] The FEC figures above submitted individually differ somewhat from those submitted by Southeastern Demurrage and Storage Bureau.

[3] MP includes the Texas & Pacific, and the Chicago & Eastern Illinois.

APPENDIX C

Remittance of excess demurrage to private car owners

	General American Transport[1]	North American Car Corporation	Pullman Transportation Leasing Company	Shipper's Car Line	Trailer Train Co.	Union Tank Car	Total amount payable to all private car owners
ATSF	18,090	20,110	18,420	13,195	5,014	7,890	121,909
BN	29,730	22,130	5,440	14,550	7,100	11,300	123,570
CNW	24,580	25,610	12,110	17,870	16,830	3,820	129,640
CRIP							
Chessie	17,410	6,750	650	7,230	9,300	4,250	200,476
D&RGW							
FEC	810	60		20	850	140	3,410
ICG	6,410	40,745	6,500	20,260	2,870	11,780	147,864
MP	19,060	8,110		17,420	12,855	8,330	103,805
N&W	22,130	13,020	5,780		10,550	1,510	97,733
PC*	167,990	53,340	15,520		1,810	29,780	538,110
SCL	27,770	13,175	4,450	13,230	4,016	5,420	98,327
SOU	21,600	16,240	7,315	13,810	10,110	4,430	107,417
SP	21,640	22,505	28,690	27,890	16,500	28,966	204,685
UP	5,910	4,550	7,580	7,150	860	2,800	35,740
*If no service order had been in effect, PC would have remitted the following to private car owners:							
PC	167,990	37,900	68,500		1,810	2,930	

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[1] Where the participants used car reporting marks, we used *The Official Railway Equipment Register*, Vol. 92, No. 1 (1976) to determine the car owners.

APPENDIX D

The following is a list of the 42 roads used to estimate the cost of administering the rule. Only roads submitting complete data (number of excess days, amount to be remitted, and administrative costs) for the study period July 1 through December 31, 1973, were used.

Burlington Northern Inc.
Penn Central Transp. Co. (ConRail)
Florida East Coast Ry. Co.
Union Pacific R.R. Co.
Chicago, Milwaukee, St. Paul-Pacific
Southern Railway System
Norfolk and Western Ry. Co.
Chicago and North Western Transp. Co.
Southern Pacific Transp. Co.
Western Pacific R.R. Co.
Oakland Terminal Ry. Co.
Central Calif. Traction Co.
Portland Traction Co.
San Manuel Arizona RR Co.
Holton Inter-Urban Ry. Co.
San Diego & Ariz. Eastern Ry.
Sacramento Northern Ry. Co.
Tidewater Southern Ry. Co.
Atchison Topeka & Santa Fe Rwy. Co.
Belt Railway Company of Chicago
Boston and Maine Corp.
Central Railroad Company of New Jersey
The Chessie System
C P Rail
Detroit, Toledo and Ironton RR Co.
Detroit & Toledo Shoreline RR
Duluth Missabe and Iron Range
Illinois Central Gulf RR
Illinois Terminal RR Co.
Kansas City Southern Lines
Lake Superior and Ishpeming R.R.
Los Angeles Junction Ry. Co.
Maine Central
Manufacturers Railway Co.
Missouri-Kansas-Texas Railroad
Missouri Pacific Railroad
The Monogehela Ry. Co.
Southern Pacific Transp. Co. (Texas & Louisiana Lines and St. Louis Southwestern Railway Company)
Louisville & Nashville R.R.
St. Louis-San Francisco Rwy. Co.
Terminal Railroad Ass'n.-St. Louis
The Texas Mexican Ry. Co.

ORDER

TITLE 49 - TRANSPORTATION
CHAPTER X - INTERSTATE COMMERCE COMMISSION
SUBCHAPTER C - ACCOUNTS, RECORDS, AND REPORTS
PART 1254 - MAINTENANCE OF RECORDS PERTAINING TO DEMURRAGE, DETENTION, AND OTHER RELATED ACCESSORIAL CHARGES BY RAIL COMMON CARRIERS OF PROPERTY

Ex Parte No. 289

REMITTANCE OF DEMURRAGE CHARGES BY COMMON CARRIERS OF PROPERTY BY RAIL

It appearing, That pursuant to part I of the Interstate Commerce Act [sections 1(4), 1(5), 1(6), 1(10), 1(11), 1(13), 1(14), 1(15), 1(17), 1(21), 6(7), 13(4), and 15(1) thereof, and the national transportation policy (49 U.S.C. preceding section 1)] and the Administrative Procedure Act (5 U.S.C. sections 553 and 559), a rulemaking proceeding was instituted by the Commission on October 12, 1972, for the purpose of considering whether the following rule should be adopted: "The nonowning railroad, on whose lines a car is being detained under demurrage, shall remit to the railroad car owner all demurrage charges collected in excess of $10 per day."

It further appearing, That investigation of the matters and things involved in this proceeding has been made and that the Commission has made and filed its report herein containing its findings of facts and conclusions thereon, which report is hereby referred to and made a part hereof, and which finds that adoption of the proposed rule, as amended therein, is warranted; wherefore,

It is ordered, That Part 1254 of Chapter X of Title 49 of the Code of Federal Regulations be, and it is hereby, amended as follows:

Sec. 1254.10.—Remittance of excess demurrage charges.

(a) Except as otherwise provided hereinafter, the nonowning railroad, on whose lines a car is being detained under demurrage, shall remit to the freight car owner, all demurrage charges collected in excess of $10 per car per day.

(b) That under this rule, for the purpose of determining the car owner in the lease of a freight car, the car owner will be the lessor; except that in cases where there is not notice of the identity of the lessor, the lessee shall be considered as the car owner.

(c) Excess demurrage shall not be remitted to a private car owner who for reasons attributable to the car owner causes the accrual of the excess charge. The excess amount, which would otherwise be remitted under the rule, shall in these situations, be retained by the delivering carrier.

It is further ordered, That this order shall become effective 90 days after the date of service, and shall remain in effect until modified or revoked in whole or in part by further order of the Commission.

And it is further ordered, That notice of this order shall be given to the general public by depositing a copy thereof in the Office of the Secretary of the Commission at Washington, D.C., and by forwarding appropriate notice to the Director, Office of the Federal Register.

353 I.C.C.

No. 36347

THE LOUISIANA GROCERS CO-OPERATIVE, INC. v. ILLINOIS CENTRAL GULF RAILROAD COMPANY

Decided March 25, 1977

Switching service to complainant's warehouse in Jefferson Parish, La., between April 16, 1975, and November 18, 1975, found inadequate and thereby in violation of carrier's duty under section 1(4) of the act to provide and furnish transportation upon reasonable request therefor. Proceeding discontinued.

C. Dale Stout and *William E. Hester III* for complainant.
Howard D. Koontz for defendant.

REPORT AND ORDER OF THE COMMISSION

DIVISION 2, COMMISSIONERS HARDIN, O'NEAL, AND CHRISTIAN

BY THE DIVISION:

The modified procedure was followed. An initial decision was served September 16, 1976. Exceptions thereto were filed by defendant, Illinois Central Gulf Railroad Company (ICG), on October 5, 1976. Complainant, Louisiana Grocers Co-operative, Inc. (Co-op), replied on October 27, 1976.

Our conclusions differ, in part, from those of the Administrative Law Judge. Except where inconsistent herewith we find the statement of facts of the Administrative Law Judge to be accurate in all material respects and adopt it as our own. Only those facts necessary for an understanding of the issues will be restated.

By complaint filed March 10, 1976, Co-op requested that the Commission issue a declaratory order finding that defendant had not provided it with reasonable service as required by the Interstate Commerce Act. Specifically, Co-op alleged that during the period from approximately April 16 to November 18, 1975, defendant failed and refused to provide adequate switching service to Co-op's warehouse at Jefferson Parish, La. This alleged failure to provide adequate service is said to be discriminatory and an unfair practice in violation of sections 1(4) and 1(11) of the act. In addition to requesting a finding of unlawfulness, Co-op sought issuance of an order that ICG cease and desist from such practices.

The record shows that on April 16, 1975, certain of Co-op's employees at the warehouse went on strike; that from this date until November 18, 1975, ICG's switch crews refused to provide switching services at the warehouse and the only switching thereat by the carrier during this interval was done by supervisory personnel on the average of 4 days after arrival of the cars in the carrier's yard, as compared to an average of 1 day prior to the strike; that there was no threat of of violence to ICG's employees and that ICG's switch crews resumed switching to Co-op on November 18, 1975, after being so directed by ICG supervisory personnel; and that during the period switching was delayed, Co-op repeatedly requested more frequent services. The strike ended on May 7, 1976.

Regarding the adequacy of the switching during the period in question, the record shows that the frequency of service was substantially less than before or after this period and also that other shippers in the area did not experience a corresponding cutback.

The Administrative Law Judge found that a common carrier is not excused from its duty to transport goods by the refusal of its employees to cross picket lines established at a shipper's place of business and that this duty includes an obligation to provide adequate switching service. He further found that ICG failed to explain its failure to direct its switching crews to resume switching service to the warehouse prior to November 18, 1975, and that the failure to provide adequate switching service during the period in question was a violation of sections 1(4) and 1(11) of the act. The Administrative Law Judge granted complainant's prayer for a cease and desist order even though satisfactory service had resumed on November 18, 1975. His basis was that the strike was continuing.

In its exceptions, defendant argues that the alleged violations were not within the scope of section 1(11) of the act since that section does not apply to switching. It is also argued that neither section 1(4) nor 1(11) of the act is applicable since they allegedly do not encompass situations where shipments are actually accepted, transported, and delivered. ICG further urges that the Administrative Law Judge should have found that its service was adequate since (1) complainant was unable to unload promptly the cars that were switched; (2) ICG made a reasonable effort to provide switching during the period in question; and (3) switching had not, in fact, been provided on a daily basis prior to that period. Lastly, defendant maintains that a cease and desist order was and is unnecessary due to the fact that the strike is not now, and was not at the time of the order, in effect, and there has been no problem with service since November 18, 1975.

DISCUSSION AND CONCLUSIONS

We agree with ICG's contention that its failure to provide adequate switching is not within the scope of section 1(11) of the act. Section 1(11) involves car service as defined in section 1(10). In *Peoria & P. U. Ry. Co.* v. *United States*, 263 U.S. 528, 533-34 (1924), the Supreme Court found that as used in section 1(10) "car service" does not include switching. We do not find convincing complainant's attempt to distinguish that case on the grounds that it did not involve switching to a customer. As defined by the Supreme Court, " ***'[C]ar service' connotes the use to which the vehicles of transportation are put; not the transportation service rendered by means of them." *Ibid*, at 533. While the *Peoria* case involved interline switching, switching to a customer is as much a transportation service as interline switching, and thus is not within section 1(11).

However, we do not agree that the inadequate service complained of falls beyond the scope of section 1(4). It is clear that a complete failure by a carrier to cross a picket line to perform transportation services, except where excused by a reasonable attempt, violates section 1(4). *Railway Clerks* v. *Florida E. C. R. Co.*, 384 U.S. 238 (1966); *Minneapolis & St. Louis Ry. Co.* v. *Pacific Gamble Robinson Co.*, 215 F. 2d 126 (8th Cir. 1954); *Montgomery Ward & Co.* v. *Northern Pacific Term. Co.*, 128 F. Supp. 475 (D. Oreg. 1953). ICG argues that section 1(4) (as well as section 1(11)) deals with *failures* to accept, transport, and deliver shipments, and not with mere *delays*. However, it is clear that a common carrier's duty includes promptness. In *Montgomery Ward & Co., Inc.*, v. *Consolidated Freightways*, 42 M.C.C. 225 (1943), in which a motor common carrier's employees refused to cross a picket line, thus delaying or preventing service, the Commission said:

> Common carriers are also bound to transport such merchandise promptly, but they are not insurers of prompt transportation. Their duty is that of reasonable diligence. For mere delay, not affecting the safety of the merchandise transported, there is no liability *if due diligence is proved*. [Emphasis added.]

See also, *Pickup Delivery Restrictions in Official Territory*, 269 I.C.C. 191, 194-95 (1947), *Montgomery Ward & Co., Inc.*, v. *C., M.,* *St. P. & P. Ry. Co.*, 268 I.C.C. 257, 260 (1947). Thus, a common carrier is in violation of its duty to provide transportation under section 1(4) when responsible for unreasonable delay.

ICG is unpersuasive in arguing that the Administrative Law Judge should have found that the switching actually provided was adequate, based on Co-op's inability to promptly unload all the cars it presently had before others were switched to it. Prior to the strike complainant was not expected to unload all the cars at its railroad siding before another switch was performed; hence, even if the record would support a finding that Co-op failed to promptly unload cars when they arrived, such evidence does not establish that the switching was adequate. Moreover, Co-op's repeated requests for more frequent switches indicate that it was not adequate.

ICG also contends that it made a reasonable effort to provide switching at complainant's plant. While ICG did attempt to provide switching by means of its supervisory personnel, it did not responsibly evaluate whether the shipper's demand for service within the normal time was a "reasonable request," as required by such decisions as *Minneapolis & St. L. Ry.* v. *Pacific Gamble Robinson Co.*, 215 F. 2d 126, 132 (8th Cir. 1954). Moreover, no reason appears on the record as to why ICG failed to direct that its employees resume switching the cars to complainant's siding until November 17, 1975, which could have avoided the delay. We note that the mere appearnce of a picket line or peaceful picketing does not usually justify failure to provide service. *Pickup and Delivery Restrictions, California, Rail*, 303 I.C.C. 579, 593 (1958).

ICG's objection that the Administrative Law Judge erroneously concluded that it provided daily switching service to complainant before the strike is insufficient to compel a finding that its service was adequate during the period in question. While prior to the strike switching was not performed daily, on the average it was performed 1 day following the delivery of cars consigned to ICG's Harahan yard. The salient fact is that delivery time to Co-op's siding increased from an average delivery time of 1 day after receipt of the cars by the defendant (with a maximum delivery time of 3 days) before the strike, to an average delivery time of 4 days (and in one instance a delivery time of 12 days) during the period in question. Repeated delays in delivery of this nature over a substantial period of time is a violation of a carrier's duty to furnish reasonably prompt transportation. See *Montgomery Ward & Co., Inc.* v. *Consolidated Freightways, supra.*

Once Co-op established that ICG did not furnish adequate transportation service, the burden of proof then switched to ICG to show that it had acted with due diligence in attempting to provide switching. ICG failed to carry its burden since it did not explain why it did not request that its employees perform switching to complainant's warehouse until 7 months after the strike began. We find that defendant's due diligence is not established and its failure to provide adequate transportation is not excused.

We also find that the defendant provided 1-day switching service for other nearby shippers, while not providing comparable service to complainant. There was no dissimilarity of circumstances which would justify such discrimination. Although these other shippers were not subject to strikes, as previously noted strikes do not excuse the duty to exercise diligence in providing service. Since the discriminatory service is not justified, we find it to be in violation of section 1(4) of the act.

Defendant also contends that the cease and desist order recommended by the Administrative Law Judge is unwarranted. However, the issue of the propriety of such an order is now moot since the strike ended on May 7, 1976, and adequate switching service was restored prior thereto, on November 18, 1975. The order has been stayed by the filing of exceptions. Therefore, no vacating order is necessary.

FINDINGS

We find that the Illinios Central Gulf Railroad Company breached its duty to provide and furnish adequate switching service upon reasonable request therefor to the warehouse facility of The Louisiana Grocers Co-operative, Inc., between April 16 and November 18, 1975, in violation of section 1(4) of the act.

COMMISSIONER O'NEAL, dissenting in part:

I agree with the majority that the ICG's failure to provide reasonably adequate switching service is not within the scope of section 1(11) of the Interstate Commerce Act. I do not, however, believe that, under the circumstances here present, the level of service provided constituted a violation of section 1(4) of the act.

The majority holds that provision of less than normally prompt service can violate section 1(4). But section 1(4) imposes a duty "to provide and furnish transportation upon reasonable request;" and it is at least arguable that delay is not an element in section 1(4), in that only the most flagrant delays, essentially resulting in a failure to furnish any transportation service at all, would constitute a violation of section 1(4).

We need not, however, reach that issue here. For in my opinion, under all the circumstances present, the ICG did in fact exercise due diligence in attempting to provide reasonably prompt switching service. While the carrier apparently did not ***require*** its employees to cross the picket lines, at least not until November, it did provide switching through its supervisory personnel. And, while the level of service provided was somewhat inferior to that provided by regular switching crews, it was not so deficient as to impute a failure of due diligence on the part of the railroad. This is especially true in view of the diminished unloading capabilities of complainant resulting from the strike.

It is ordered, That the proceeding be, and it is hereby, discontinued.

Ex Parte No. 252 (Sub-No. 2)

INCENTIVE PER DIEM CHARGES—GONDOLAS

Decided March 21, 1977

Upon Notice of Proposed Rulemaking and Order of September 4, 1975, Part 1036 of Title 49, Code of Federal Regulations, amended so as to establish incentive per diem charges on plain gondola rail freight cars.

W. Donald Boe, Jr., Phillip S. Brown, Charles W. Burkett, R. David Bustard, Martin L. Cassell, Emeried D. Cole, Jr., John A. Daily, John F. Donelan, Earl E. Eisenhart, Jr., Wayne L. Emery, G. E. Farnell, Richard J. Flynn, Stuart F. Gassner, James S. Goode, Howard Gould, Richard A. Hollander, Peter J. Hunter, Jr., George Kleinberger, Howard D. Koontz, Albert W. Laisy, David R. Larrouy, Kim D. Mann, John K. Maser III, Milton E. Nelson, Jr., C. George Niebank, Jr., C. Harold Peterson, Thomas H. Ploss, Harold Pockrose, Robert B. Reedy, David Reichert, John L. Richardson, Thomas L. Saybolt, Kent P. Shoemaker, John MacDonald Smith, Stephen D. Strauss, James R. Taylor, Max O. Truitt, Jr., John S. Walker, Jr., Walter T. Winslow, Jr., Frederick L. Wood, G. Edward Yukon, C. F. Zellers, Jr., and *Robert E. Zimmerman* for respondents, shippers, and interveners.

Report of the Commission

O'Neal, *Commissioner*:

This rulemaking proceeding was initiated by petitions filed by the Chessie System Lines[1] and the Norfolk and Western Railway Company, to institute a rulemaking proceeding under section 1(14)(a) of the Interstate Commerce Act,[2] to issue rules and regulations establishing incentive per diem (IPD) charges on plain and equipped gondola freight cars.[3] Pursuant to these petitions, a Notice of Proposed Rulemaking and Order served September 12, 1975, and published on September 30, 1975, in volume 40 of the Federal Register at page 44851, instituted this proceeding for the purpose of determining whether existing incentive per diem rates on boxcars found in Part 1036, Title 49 of the Code of Federal Regulations (CFR) should be amended so as to become applicable on gondola cars. Specifically, it was proposed that 49 CFR 1036 be amended by adding the words "and gondola cars" to the title and inserting those words following the word "boxcars" in sections 1036.2 and 1036.3, and that mechanical designations for plain and/or equipped gondola cars be added to those listed at 1036.1. It was further proposed that the use of funds earmarked in accordance with section 1036.3 to build, rebuild, lease, or purchase gondola cars be governed by the matching funds approach adopted in *Incentive Per Diem Charges—1968 (XF Cars)*, 350 I.C.C. 11.[4] Suggestions regarding the use of unspent funds and the application of a year-round incentive per diem charge were requested. All common carriers by railroad were made respondents to this

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[1] The Chesapeake and Ohio Railway Company, The Baltimore and Ohio Railroad Company, and Western Maryland Railway Company.

[2] Section 1(14)(a) of the Interstate Commerce Act (49 U.S.C. 1(14)(a)) reads as follows:

> (14)(a) It is the intent of the Congress to encourage the purchase, acquisition, and efficient utilization of freight cars. In order to carry out such intent, the Commission may, upon complaint of an interested party or upon its own initiative without complaint, and after

(footnote continued on next page)

(footnote 2 continued)

notice and an opportunity for a hearing, establish reasonable rules, regulations, and practices with respect to car service by common carriers by railroad subject to this part, including (i) the compensation to be paid for the use of any locomotive, freight car, or other vehicle, (ii) the other terms of any contract, agreement, or arrangement for the use of any locomotive or other vehicle not owned by the carrier by which it is used (and whether or not owned by another carrier, shipper, or third party), and (iii) the penalties or other sanction for nonobservance of such rules, regulations, or practices. In determining the rates of compensation to be paid for each type of freight car, the Commission shall give consideration to the transportation use of each type of freight car, to the national level of ownership of each such type of freight car, and to other factors affecting the adequacy of the national freight car supply. Such compensation shall be fixed on the basis of the elements of ownership expense involved in owning and maintaing each such type of freight car, including a fair return on the cost of such type of freight car (giving due consideration to current costs of capital, repairs, materials, parts, and labor). Such compensation may be increased by any incentive element which will, in the judgment of the Commission, provide just and reasonable compensation to freight car owners, contribute to sound car service practices (including efficient utilization and distribution of cars), and encourage the acquisition and maintenance of a car supply adequate to meet the needs of commerce and the national defense. The Commission shall not make any incentive element applicable to any type of freight car if the Commission finds that the supply of such type of freight car is adequate. The Commission may exempt such incentive element from the compensation to be paid by any carrier or group of carriers if the Commission finds that such an exemption is in the national interest.

[3] The Chessie System Lines petitioned for establishment of incentive per diem on plain gondola cars only.

[4] Net credit balances resulting from incentive per diem settlements would be matched by an equal amount of the carrier's own fund.

proceeding. Railroad respondents, the Commission's Bureau of Investigations and Enforcement (formerly the Bureau of Enforcement and hereinafter referred to as the Bureau), and interested parties were requested to submit written statements of verified facts, views, and arguments. In response to our notice of rulemaking, 29 parties filed statements, 18 in general support of the proposal to extend IPD charges on plain gondolas, 12 in opposition, and 1 party taking no position.[5]

BACKGROUND

Effective May 26, 1966, Public Law 89-430 amended section 1(14)(a) of the Interstate Commerce Act to determine the adequacy and requirements of the national freight car supply and to impose incentive elements upon users of such cars if found necessary. Pursuant to the amendment, the Commission in Ex Parte No. 252 (Sub-No. 1) embarked upon an investigation of the adequacy of freight cars and the need of an incentive per diem charge on such cars. The Commission determined that the investigation proceeding would be "open-ended" in that IPD charges could be modified as future circumstances require, and whereby studies, suggestions, and proposed changes could be submitted as the IPD charges were tested in the light of actual experience. As a result of the investigation, an IPD charge based on an overall annual rate of return of 12 percent[6] was imposed on plain boxcars during the fall and winter months. *Incentive Per Diem Charges—1968*, 337 I.C.C. 183 (1969); 337 I.C.C. 217 (1970); affirmed 368 F. Supp. 1009 (1973). In so doing the Commission required that IPD funds received be earmarked, and that a minimum average investment in boxcars based on the past experience of each carrier for the years 1964-68 be made by a carrier each year before it could draw down incentive per diem funds. The average investment requirement was for the purpose of ensuring that IPD funds would be spent for boxcars over and above what was normally expended.

By order dated March 30, 1973, the Commission extended incentive per diem on boxcars to year-round application which resulted in an overall annual rate of return of 18 percent. This action was affirmed in court. See *Ann Arbor Railroad Company* v. *United States*, 368 F. Supp. 101 (1973). Later, incentive per diem on plain boxcars was returned to the original 6-month application and the 12-percent overall annual rate of return on investment. *Incentive Per Diem Charges—1968*, 350 I.C.C. 464 (1975).

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[5] See appendix A for list of parties in general support and in opposition of the proposal to extend incentive per diem charges to plain gondolas.

[6] We determined that an overall rate of 12 percent per year would be a just and reasonable figure. This overall percentage was achieved by fixing charges which would produce an 18-percent rate of return during the half-year period in which IPD charges applied. By averaging this rate of return with the 6-percent rate earned on basic per diem on boxcars during the remainder of the year, an overall figure of 12 percent was developed.

An extension of incentive per diem to XF boxcars was ordered by the Commission in *Incentive Per Diem Charges—1968 (XF Cars)*, 350 I.C.C. 11 (1975). Unlike the 6-month application of IPD charges on plain boxcars, the IPD charges on XF cars became applicable on a year-round basis reflecting an 18-percent overall annual return on investment. The 1964-1968 average acquisition requirement applicable on unequipped boxcars was not adopted because the "XF" designation did not exist prior to 1973. In lieu there was instituted an equal matching funds requirement whereby funds generated under incentive per diem charges had to be matched by expenditures made from the carrier's general corporate fund. The matching funds requirement for XF cars was believed to encourage at least minimal corporate expenditures in addition to the incentive per diem funds generated on XF cars.

CHARACTERISTICS OF THE GONDOLA CAR

Gondola cars are open-top cars generally unloaded from the top. The floors are solid steel or wood; the sides are 3 to 5 feet high. Whereas open-top hopper cars have pockets and can be unloaded through bottom door gates, gondolas must be unloaded from the top (or by rotary dumper). Unloading of gondolas is normally accomplished by using overhead cranes equipped with clamshell buckets or electromagnets. Manual loading is of course possible and rotary dumping is possible where available. Because the cars have open tops, they are often used for commodities that do not require protection from the elements.

The basic mechanical designation for gondolas is GB. Plain gondolas, which are designated GB, have open tops, fixed sides, fixed or drop ends and solid bottoms. Plain gondolas are normally divided into two categories: (1) cars under 61 feet inside length, which are used for iron or steel products, scrap, stone, et cetera; and (2) cars 61 feet inside length or more, which are used for structural steel and other commodities requiring additional length. There is also the equipped gondola, which is a gondola with permanent racks or other specifically modified equipment used in loading particular commodities.

Gondolas represent an important part of the railroad fleet and serve basic transportation needs. The typical commodities transported in gondolas include iron, steel products, machinery and machinery parts, glass, lumber, timber and logs, clay, limestone, sand, gravel and bulk commodities, and metal scrap. These bulk heavy commodities are particularly suited for rail transportation in gondolas. The major industries using gondolas include the steel mills, metal scrap dealers, structural steel plants, automotive manufacturers, other machinery companies and the construction industry. With the exception of the construction and agricultural industries, seasonal changes have little effect upon the utilization of gondolas.

DISCUSSION OF ISSUES

At issue in this proceeding is whether the incentive per diem program should apply to plain and equipped gondola cars. The Commission has expressed a willingness to expand the incentive per diem program to cars other than the general service boxcar if the proper record is made. See *Incentive Per Diem Charges—1968*, 349 I.C.C. 303, 311 (1975). The record must show among other things, an inadequate supply of the type of car, and a *need* for an IPD charge so as to encourage acquisition and maintenance of a car supply adequate to meet the needs of commerce and the national defense.

Most of the railroads who oppose the expansion of the IPD program to gondolas are also in general opposition to the existing IPD program on boxcars and the IPD concept in general. They argue that the Commission should not expand upon a program that is economically unsound and is ineffective in creating incentive to purchase new cars and enhancing utilization, and furthermore is not of a general benefit to the transportation industry.

In support of their contentions, the opposing railroads submit that the IPD program on boxcars has been ineffective as manifested by the continuous decline in the supply of boxcars since the implementation of the IPD program, the fact that taxes take 26 percent of the IPD transferred funds out of the railroad system, and the fact that the Union Pacific has millions in an earmarked account that it is unable to use because of its inability to comply with the average investment requirement. Moreover, opposing railroads argue that the IPD program in theory is unsound since it results in the poor railroads paying the rich railroads IPD charges, where it is the poor debit railroads that are in greater need of the funds. They further indicate that the IPD program is inequitable to terminating lines who do not need more cars and will not purchase more cars, and that the division of rates on some commodities and movement are too low to support additional car-hire charges. They suggest as alternatives to the IPD program, the reduction in free time for loading, increasing demurrage charges, the use of car service rules, and an increase in basic per diem.

In reply to these arguments, Norfolk and Western Railway Company contends that the opposition expressed by the railroads is beyond the scope of this proceeding since the Commission is only narrowly concerned with the issue of whether to expand the IPD program to gondolas, and that the efficacy of the IPD charge in producing incentive to purchase and rebuild cars has been previously recognized by the Commission and is not here in issue.

While it is true that the instant proceeding is limited in its scope to the issue of whether to expand IPD charges to gondolas, and is not a proper forum for correcting alleged deficiencies that may exist in the IPD program on boxcars, consideration of the deficiencies cannot be entirely dismissed. In expansion of any on-going program one must examine the effectiveness of the existing program.

Most of the arguments put forth by the opposing railroads are not new but have been raised and considered by the Commission in prior proceedings. The continued decline of boxcars under the IPD program does not rebut the effectiveness of the IPD program. In implementing the IPD charge on boxcars we recognized that we could not immediately change an annual decline in boxcars to an annual gain, but merely sought at least to reduce the rate of decline in the national supply of general service unequipped boxcars. See *Incentive Per Diem Charges —1968*, 337 I.C.C. 183, 191 (1969).

While the IPD program on boxcars does not appear to be without imperfections it does accomplish the main purpose of incentive per diem, in that it makes the acquisition of new boxcars financially attractive to railroads. Inequities and shortcomings are bound to exist in any program of the complexity and magnitude of the IPD program on boxcars; however, none of the deficiencies raised by the opposing railroads are so deleterious as would warrant total rejection of the IPD program. By making the IPD proceeding "open-ended" the Commission has encouraged feedback on problems incurred and has endeavored to correct them. With this in mind, we do not blindly approach the issue of whether simply to expand upon the existing IPD program to gondolas, without modification, but if expansion is warranted we seek to improve upon any existing shortcomings.

The Congress in enacting section 1(14)(a) of the Interstate Commerce Act included the incentive per diem provision in hope that an added incentive charge could help alleviate the chronic shortages in freight cars that the Nation was experiencing and correct the obvious continued decline in the total number of freight cars. Section 1(14)(a) of the act provides that the Commission shall not make any incentive element applicable to any type of freight car if the Commission finds that the supply of such type of car is adequate. Accordingly, an essential prerequisite to the expansion of the IPD program to gondolas is a finding that the gondola supply is inadequate.

Determination of what constitutes an adequate or inadequate supply of freight cars is a complex task. The Commission will not make a determination of car adequacy based on shortage data alone, but requires a more comprehensive analysis of the supply and demand of freight cars. See *Incentive Per Diem Charges,* 332 I.C.C. 11, decided October 3, 1967. An overall, nationwide review of traffic and service demands and trends precede any valid determination of existing or prospective national requirements for freight cars of particular types. *Incentive Per Diem Charges,* 332 I.C.C. 11, 15.

As evidence of chronic gondola car shortages, summaries of CS-44 reports[7] of member railroads to the Association of American Railroads (AAR) were introduced in this proceeding as partially appearing in appendix B. The summaries show that both surpluses and shortages of gondola cars have occurred over the last 5 years.[8] Shortages have been chronic and have appeared in 1965 through 1970 and again in 1973 through March of 1975. While each territory has shown large shortages of plain gondolas, the West had generally the largest shortages, followed by the East and the South. Since April of 1975 to the present time net gondola surplus balances have been reported.

Given the present reported surplus of gondola cars, the opposing railroads argue that the Commission is without authority to impose incentive per diem charges at this time. Moreover, Penn Central Transportation Company argues that the Commission has no authority even to impose incentive per diem on the basis of future shortages. In justification it argues that the "adequate supply" terminology of the IPD provision is interpreted like "shortage" terminology under the emergency car service rules of section 1(15) of the act, where the Commission has authority to impose car service orders on "existing" emergency shortages only.

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[7] The CS-44 reports list as shortages the cars ordered placed for loading in excess of the number actually placed, provided the orders remain unfilled for 24 hours prior to 6 p.m. of the reporting day. The CS-44 reports also list as surpluses the cars which are in excess of those needed to fill existing or anticipated orders for the next day.

[8] We recognize that the magnitude of shortages reflected by CS-44 data may be exaggerated somewhat because of duplicative orders, however, it is acceptable evidence of shortage and surplus conditions and is considered and evaluated accordingly.

We disagree with these contentions. Section 1(14)(a) of the act employs the terminology "adequate car supply," not "surplus" (or "shortage"); the terms are not synonymous. An existing surplus taken alone does not signify that the gondola supply is adequate. See *Incentive Per Diem Charges—1968*, 350 I.C.C. 464, 469 (1975). Our analysis of the supply of gondola cars is not limited to whether there currently is a shortage or surplus, but is primarily concerned with whether the gondola supply will be adequate to meet the future needs of the Nation. The present gondola surplus appears to be a result of the recession, however, with an improvement in our economy it can be expected that the supply of gondola cars will return to its historical shortage condition.[9] Thus, existence of a current surplus of gondola cars does not bar this Commission from imposing incentive per diem charges, if there is a showing of predicted significant future shortages of the car supply based on a sound analysis of trends and operation characteristics of the car fleet.

Reported shortages result because of three basic situations. First, the total number of freight cars may be adequate to fulfill orders but because of ineffective utilization of cars between territories and individual lines, shortages occur. Second, the supply of freight cars may be inadequate, causing shortages. Third, an inadequate supply of cars and ineffective utilization of cars may together cause shortages. Upon examination of the gondola shortage data presented in appendix B, it appears that the chronic shortages that have occurred in the 1970's are primarily caused by an inadequate gondola car supply and not because of poor utilization. This is evident because in shortage situations surpluses reported were minimal in comparison to large reported shortages.

As further evidence of the inadequate supply of gondolas is the trend of a decrease in gondola ownership as presented in appendix C. The decline in gondola cars has been substantial over the last 15 years. In 1961, the railroads maintained a fleet of 266,534 cars. In 1975, this fleet had declined to 177,344 or a loss of 89,190 cars. This represents a decline in the available fleet of approximately 33 percent. This decline has not been offset by substitutable car types.

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[9] This assertion will be supported later in this report.

However, the dramatic decline in the gondola fleet does not by itself imply that the supply is inadequate. Other factors, such as capacity, age, retirements, utilization, and future requirements of gondolas must be considered in determining adequacy of the gondola fleet. Also, noteworthy is the fact that, while the total supply of gondola cars (plain and equipped) has been declining, equipped gondolas have been increasing in number, from 23,202 as of January 1, 1968, to 28,456 as of January 1, 1975.

The large decline in gondola cars that has occurred over the last 15 years has been offset in part by increases in the carrying capacity of the average gondola car which has risen from 62.12 tons in 1961 to 75.74 tons in 1975, an increase of 22 percent. However, although gondola cars have grown in size, this has not offset the total decline in the number of gondola cars over the last 15 years as manifested by the decline in aggregate fleet carrying capacity as presented in appendix D. Over the last 15 years aggregate fleet carrying capacity has declined from 16,557,092 tons to 13,431,277 tons, a decrease of 19 percent.

Utilization is another factor which must be examined in determining if the supply of gondolas is adequate. For example, a decline in the total number of gondolas could be offset by an increase in the average trips per gondola car each year. Appearing in appendix E are the average trips (loads) per car per year and the number of days between loads for the years 1965 through 1974. Over this 10-year period, utilization has not increased so as to offset the decline in the total number of gondola cars. Also noteworthy is the fact that greater utilization of gondolas was achieved during times of shortages than of surpluses. In 1973, with a severe gondola shortage, the average number of days between loads ("turnaround time") was 17.7. That 17.7 days represents a maximum level of utilization for gondolas. Conformably, the average loads per car per year experienced—20.6—represents maximum utilization. Note that even with maximum levels of utilization, shortages of serious magnitude prevailed. This supports our earlier statement that the chronic shortages primarily resulted because of inadequate car supply, not because of ineffective utilization.

The age distribution of the gondola fleet as of October 1, 1975, is presented in appendix F. For plain gondolas the average age is 16.7

years compared with 13.3 years for equipped gondolas. The age of the entire gondola fleet has been rising. For the year 1971, the average age of all gondolas was 14.4 years; as compared with 16.4 years in 1975. Age merits consideration, for two reasons. First, age reflects utilization, in that newer cars are prone to be more serviceable and could be more effectively utilized. Second, age is a determinative factor in respect to expected future retirements. The fact that the average age of gondolas is increasing suggests that retirements will increase somewhat in the future. More than 69,000 of the Nation's plain and equipped gondolas are 21 years of age or older. This represents more than 37 percent of the total fleet.

Appendix G compares new and rebuilt gondolas to retired gondolas for the years 1964 to 1974. Throughout this period the railroads have retired more gondolas than they have installed. Given the past down trend in gondola inventories, and the further downward trend which can be expected with so many cars nearing retirement, it seems logical to conclude that the frequency and/or severity of gondola shortages will continue to increase unless new car purchases rise very substantially.

Thus far we have been primarily concerned with the supply of gondolas; we now proceed to examine the demand for gondolas. The steel industry is a major user of gondolas and gondola demand is thus directly related to steel productivity. From 1961 to 1974, when ownership of gondola cars decreased by 33 percent and carrying capacity by 19 percent, there was a 66-percent increase in steel shipments and a 100-percent increase in scrap received.[10] The steel industry satisfied its increasing transportation needs in the face of the decline in the gondola fleet by shipping an increased percentage of its products by truck. The American Iron & Steel Institute (AISI) estimates that steel shipments by truck increased from 28.1 percent of the total market in 1956 and 40.7 percent of the total market in 1961, to 48.9 percent of the total market in 1974. While the causes of this increased usage of truck transportation are many, the inadequacy of the supply of gondola cars was certainly a contributing factor.

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[10] We recognize that 1961 was a depressed year for steel and scrap shipments and that percentage increases shown over the 1961-1975 time period is biased. A more representative time period for comparison, is the time period from 1956 to 1975, where there was a 31.5-percent increase in steel shipments and 37.9-percent increase in scrap received, thus still reflecting a significant increase in demand considering a 36.7-percent decline in the gondola supply. Source of steel and scrap statistics—exhibits C and D of the initial statement of the American Iron & Steel Institute.

Whether we can expect a return of chronic shortages depends on our Nation's future gondola requirements. We are now experiencing a general recovery in our economy and increases in productivity are expected in those areas relying upon gondolas. Large increases are predicted in steel shipments. Although steel shipments have fallen off sharply during 1975[11] thus causing the current gondola car surplus situation, many economic forecasters project a return to normal levels in the near future.[12] The Bureau submitted evidence which indicated a general improvement in the economy coupled with a projection of increase in steel productivity and demand for plain gondolas. Because of deficiencies in the Bureau's method of analysis[13] we have reformulated the methodology for the projection. Our restated projection, appearing in appendix H, shows that we can expect, even with future increasing tonnages per car and high utilization rates, an increase in car shortages between 1978 and 1985 if the down trend in car ownership is not reversed. Also, appendix B shows that plain gondola surpluses declined from a high of 10,208 reported surpluses for the week ending January 3, 1976, to a reported surplus of 3,717 for the week ending December 4, 1976.

Based on the declining number of gondola cars, the chronic shortages experienced, and the fact that with an expected economic recovery significant plain gondola shortages can be expected in the near future, we find that the supply of plain gondolas is inadequate. However, a finding that the supply of plain gondolas is inadequate does not alone warrant the imposition of IPD charges. One of the purposes of the incentive per diem program besides providing funds for the acquisition of cars found to be in short supply, was to encourage the prompt return of existing cars. Considerable evidence was presented by the railroads showing both efficiencies and inefficiencies in the utilization of gondola cars. Several railroads indicated that incentive per diem charges would have no effect on existing car utilization practices, and that an increase in efficiency of gondola cars would not result. For example Florida East Coast

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[11] In 1974 AISI reported steel shipments of 109 million tons versus an estimated 82 million tons shipped in 1975.

[12] The Industrial Economic Research Institute of Fordham University, in a report prepared for the U.S. Department of Commerce, has projected in 1980 steel shipments will amount to 128.1 million tons—an increase of 17 percent over 1974 shipments. (Initial statement of American Iron & Steel Institute, p. 7.) The AISI's long-range projections are more conservative. AISI has estimated by 1983 steel shipments will amount to 121 million tons and that by 1985 steel shipments will amount to 127.1 million tons.

[13] The Bureau in its submitted carloading forecast, projected carloading based on gondolas under 61 feet in length and erroneously excluded those unequipped gondolas over 61 feet in length among other things.

Railway Company (FEC), which is primarily a terminating railroad, asserts that incentive per diem applied to gondolas cannot and will not improve the efficiency with which FEC moves foreign gondolas or induce FEC to acquire additional gondolas. It contends that it is presently moving foreign cars, including gondolas, off its line with maximum efficiency and dispatch and that it already owns sufficient gondolas to meet the needs of its shippers.

The argument raised by FEC is not novel. The Commission has previously considered the position of terminating roads in deciding whether they warrant exemption from IPD charges. In *Incentive Per Diem Charges—1968*, 337 I.C.C. 217, 232, we stated that:

> it would not be in the national interest to exempt a group of carriers merely because they terminate a substantially greater number of carloads than they originate, or because they already own a sufficient number of cars to satisfy their own needs.
>
> ***The terminating roads that have requested an exemption argue that they cannot be expected to add to the national car fleet by direct purchase; nevertheless, they can be expected to contribute to improved car utilization, given the incentive to do so. Moreover, a terminating railroad, like any other railroad, has a substantial interest in the maintenance of a national car supply, whether by direct purchase, or indirectly by better enabling the creditor roads to augment the car fleet.

While a small number of railroads may be highly efficient in moving gondola cars and may own a sufficient number of cars to protect their loadings, this would not be reasonable cause for not imposing a national IPD program on gondolas or exempting these particular carriers. Our concern is with the overall utilization and distribution of the Nation's gondola supply.

As previously indicated, shortages may result because of both an ineffective utilization of cars (an imbalance in distribution) and an inadequate car supply. The shortages experienced in the early 1970's were national in scope and were caused primarily by an inadequate car supply; however, there also appeared to be at times a significant imbalance in the distribution of gondola cars. As evidence thereof, reference is made to the fact that the AAR periodically had to issue Car Relocation Directives and Car Assistance Directives or enlarging amendments thereto, to require the return home of plain gondolas to owning railroads. The Chessie System and other eastern railroads submit that the western railroads are not equipped with an adequate supply of plain gondolas and consequently siphon them off from the eastern lines which supplied them and require their return.

An indication of the gondola distribution problem can be found in the AAR TRAIN report which shows the percentage of cars on-line to cars owned for individual railroads and territories. The TRAIN report shows for plain, equipped, and total gondolas, for each individual railroad, the ownership of that railroad, the system cars on line, the percentage of cars owned that are on line, the total cars on line, and the percentage of cars on line to cars owned. The most significant column of the TRAIN reports is the percentage of cars on line to gondolas owned. As of January 1, 1975, a time when there was extreme gondola demand and net shortages the TRAIN report shows the following percentage of cars on line to cars owned by region.

	Plain	Equipped	Total
	Percent	*Percent*	*Percent*
East	91.4	84.4	90.4
South	85.0	139.4	87.5
West	113.8	110.1	113.0

As of May 15, 1976, a time of less gondola demand and when net surplus in gondolas were reported, the percentages of cars on line to cars owned, by region were as follows:

	Plain	Equipped	Total
	Percent	*Percent*	*Percent*
East	97.1	87.6	95.6
South	90.7	134.7	93.0
West	110.8	107.4	110.0

The TRAIN report for May 15, 1976, shows that the eastern railroads owned 67,235 plain gondola cars, or about 45 percent of the national plain gondola fleet. The western roads owned 54,866 gondolas, or about 37 percent of the fleet. The report also indicates that the eastern roads had only 65,317 plain gondola cars on line, whereas the western railroads had 60,776 cars on line. Thus, it appears that even in a gondola surplus situation there is some imbalance in gondola distribution based on ownership. In periods of gondola shortages, as represented by the January 1, 1975, TRAIN report, gondola imbalances were more severe.

Chicago and North Western Transportation Company (CNW) criticizes the use of the ratio of cars on line to ownership as indication of appropriation by a carrier of other carriers' cars. It argues that this ratio reflects the balance of a carrier's originations to terminations rather than an appropriation of foreign cars or an insufficient level of ownership. CNW claims that the ownership of gondolas is already optimally distributed among railroads, and any change in the pattern of ownership would reduce utilization and economic efficiency.

As evidence thereof, CNW submits a sample of the pattern of interterritorial movements of gondola cars based on a 1972 1-percent Waybill Study showing that the western district terminates 6 percent more cars than it originates, thus accounting for the higher percentage of gondola cars on line to gondolas owned for the western district. We agree with CNW that the TRAIN statistics alone are not conclusive evidence of the western carriers' appropriating eastern carriers' gondola cars. The imbalance of gondolas is apparently to some extent, as CNW claims, a result of the western district terminating more cars than it originates. While the eastern carriers have charged that the western carriers are holding their gondola cars for long periods of time without returning them, there is little hard evidence of record to support these allegations. However, the lack of such evidence is not fatal to a finding that IPD charges on gondolas is warranted. The statute states that the incentive element shall in the Commission's judgment contribute to sound car service practices, including efficient utilization and distribution of cars, among other factors. We believe that imposition of IPD charges on gondolas will have a beneficial effect on both utilization and distribution of gondolas. No specific evidence was presented by opposing parties showing that IPD charges would be harmful either to utilization or distribution of gondolas. The mere fact that a particular carrier, or the carriers in a particular region, terminate more gondola car traffic than they originate cannot be advanced as evidence that incentive per diem will not result in the more expeditious release and/or interchange of cars or that it will not reduce the ratio of cars on line to cars owned for certain carriers.

We do note, however, that the Bureau has indicated their belief that IPD alone provides little stimulus for the prompt return to the owning road of the IPD car. This belief is apparently based upon general observation of the utilization of boxcars. Even if the Bureau is correct, this would not be fatal to the imposition of IPD charges, since a primary purpose of IPD charges is to create investment incentive to purchase cars in short supply, and so long as utilization and distribution of cars is not detrimentally affected, we believe such charges would be justified, assuming an adequate record on all other matters. If the national level of ownership of gondola cars were sufficiently high, the shortage of gondola cars could conceivably be remedied by more expeditious release and/or interchange of gondola cars. However, in light of the low level of present and projected gondola ownership, it is clear that the supply of gondola cars would be inadequate even if gondola cars were used more intensively than is presently the case. Thus the question of gondola car utilization deserves a minor role in considering whether IPD on gondola cars is warranted.

Moreover, while IPD charges have had apparently little effect on the return of boxcars to the owning railroad, this does not necessarily imply that the same would be true for gondola cars. As the revenue earned on a borrowed boxcar is often significantly higher than the per diem charge, the carrier using the borrowed boxcar has had little incentive to return the car. In other words, the incentive to return cars is a function of the difference between the revenue earned on the borrowed car and the cost of keeping the car. In the case of the gondola car, because of the commodities hauled (scrap, aggregates, and pulpwood) the revenues are considerably lower than revenues earned on boxcars, which would indicate that there may be more incentive to return gondola cars than boxcars to the owning railroads if IPD charges are imposed. Accordingly, we believe that imposition of IPD charges on gondola cars will contribute to sound car service practices, will increase utilization, and will not be detrimental to the distribution of gondolas.

Another consideration in deciding if IPD is warranted, is whether there is a need for an additional incentive to purchase the gondola car. Substantial evidence was presented by the parties showing that such a need does exist. The significant decline in the total number of gondolas is attributable to the fact that the gondola car is a poor investment as compared to other investment opportunities. The Union Pacific states that several proposed gondola acquisition programs were cut back or eliminated from their budget because of the low return on investment.

This low return on gondola investment is a result of several factors. First, the bulk commodities hauled by gondola car generate less revenue than commodities hauled by other car types. Iron and steel articles and scrap make up a significant percentage of the commodities moving in gondolas. In *Investigation Of Railroad Frt. Rate Structure*, 345 I.C.C. 867, 1192 (1976), the Commission recognized the short supply of gondola cars and the fact that while earnings of a per-shipment basis appeared to be adequate for the vast majority of all shipments of scrap, that such earnings apparently were not sufficient inducement to the railroads to make the investment necessary to provide an adequate number of scrap cars. Sand, gravel, and aggregates which move in gondolas also produce low revenue.

The present basic per diem earned on gondola cars off line is also argued by some of the parties to be too low to meet ownership costs. The Union Pacific argues persuasively that the existing basic per diem fails to return the car owners' cost of ownership. This is said to be attributable to the use of an historical average of repair costs, with no adjustment for inflation, in computing current car ownership costs of repairs. Other factors said to contribute to the failure to return ownership costs, are inadequate depreciation, the use of past property taxes to compute current property taxes and deficiencies in the method of computing the car owners' cost of obtaining debt and equity funds. The Commission is cognizant of the fact that existing basic per diem fails to return full ownership cost because of the timelag in the method of revising basic per diem rates in a period marked by rapid inflation in all ownership costs. As required under section 212 of the Railroad Revitalization and Regulatory Reform Act of 1976 (hereinafter referred to as the 4R Act), which amended section 1(14)(a) of the Interstate Commerce Act, we are now in the process of revising rules, regulations, and practices with respect to freight car service including the basic per diem formula. We recognize that such future refinements of the basic per diem formula may possibly eliminate or modify the incentive per diem element, but in the instant proceeding the decision whether incentive per diem on gondola cars is warranted must be made on the existing record and not upon possible future modifications. Since the earnings of gondola cars are generated in a large degree by per diem charges,[14] it is obvious that new investment in gondola cars will not occur if per diem charges are too low.

Investment in gondolas is made even more unattractive by the rapid escalation in the price of gondola cars in recent years. Pittsburgh and Lake Erie Railway Company (P&LE) reports that inflation in cost of new car construction which has increased an alarming 110 percent over the past 9 years. A 100-ton 52 foot 6 inch P&LE ordinary gondola built in 1967 cost $12,621; in 1972 cost $12,912 (2 percent increase); in 1974-1975 cost $21,210 (68 percent increase) and quotations for 1976 are $26,568 per car, or a 110-percent increase.

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[14] The percentage of gondola cars off line generally varies from 40 to 60 percent. As of May 15, 1976, the AAR TRAIN report shows 41.9 percent of the U.S. plain gondolas off line.

Another factor causing funds to be invested in other car types, is the destructive nature of the handling given the gondola car by the typical user thereof, especially in regard to the transportation of scrap where the cars take great abuse in the loading and unloading procedure. Because of this abuse the service lives are shortened and the cars are more apt to be found unserviceable. The obvious result is that the flow of revenue on gondola cars is lessened.

Based on the foregoing facts, we believe that there is a need for an additional incentive to purchase plain gondola cars and that IPD charges will create this incentive. Because the gondola car serves such basic United States industries as the building industry and the steel industry, the expected effects of an IPD charge on plain gondolas will be to the general benefit of this Nation. Accordingly, we find that application of IPD charges on plain gondola cars is warranted on the evidence presented.

Section 1(11) of the Interstate Commerce Act requires the railroads to furnish adequate car service to shippers. "Car service" is defined by section 1(10) of the act to include the "use, control, supply, movement, distribution, exchange, interchange and return" of freight cars. The concept of incentive per diem meets this need directly by making it sufficiently attractive for those railroads currently investing in gondolas to continue or accelerate such investments knowing that a reasonable return will be earned for off-line use, it also creates the situation that railroads not owning a realistic fleet of gondolas will see benefit in investing in such equipment for either an incentive reason (earning a return themselves) or a penalty reason (to avoid the higher charges for using another road's equipment).

In respect to the issue of whether IPD charges should also be extended to equipped gondolas, there is no general consensus among the parties either in favor of or in opposition to such an extension. As indicated earlier, equipped gondolas are cars with specialized equipment used in the loading and unloading of certain commodities. Sometimes the specialized equipment may preclude the use of the gondola car for movement of other types of commodities. For example, a railroad could not use a gondola with self-cleaning floors (steel mesh) for hauling sand or small dimension aggregates. Equipped gondolas are generally designed to meet specific shippers' need, however, only about 10 percent of the equipped gondolas are actually assigned to specific shippers. The steel industry, among others, relies upon equipped gondolas for basic transportation purposes. Between 12 and 16 percent of the total gondola loadings involve equipped gondolas.

The parties in favor of imposing IPD charges on equipped gondolas argue that IPD charges are warranted because past shortages of equipped gondolas indicate that the supply is inadequate and that a need exists for an incentive to purchase equipped gondolas. It is further contended that a problem will occur by placing an incentive per diem element only on plain gondolas, namely that equipped gondolas would be switched to plain gondolas. The Norfolk and Western Railway Company (N&W) submits that the equipped gondola situation is analogous to the XF boxcar, where it was necessary to encourage the acquisition of XF cars, by placing it "on the same footing" as plain boxcars. See *Incentive Per Diem Charges—1968 (XF Cars)*, 350 I.C.C. 11, 16 (1975). Therein, the Commission found that incentive per diem on plain boxcars was fostering expansion of such cars but may at the same time "tend to result in reduced acquisition of other types of cars necessary to meet the needs of commerce." In placing XF boxcars under the incentive per diem regulations, the Commission noted its reluctance to permit assignment to any particular shipper and thus prohibited such assignments. The Bureau also supports the inclusion of the equipped portion of the gondola fleet under IPD, on the gound that it is too small in number to justify its exclusion from IPD coverage.

We disagree with the arguments. One of the main purposes of the incentive per diem program is "to make acquisition of new cars financially attractive to railroads." *United States* v. *Florida East Coast R. Co.*, 410 U.S. 224, 233 (1973). Class I railroads' ownership of equipped gondolas has grown from 23,202 on January 1, 1968, to 28,456 as of January 1, 1975, an increase of 23 percent. That increase in ownership indicates that railroads requiring this type of equipment are taking positive steps to acquire additional cars. Thus, we believe that carriers need no further incentive to spur their acquisition of equipped gondolas.[15] Furthermore, there is no evidence to support the contention that equipped gondola cars will be interchanged with plain cars. In fact, what little evidence was presented leads to the contrary conclusion, that equipped gondolas because of their specialized equipment cannot in many cases be easily substituted for the plain gondola car. Moreover, we have no reason to believe that future acquisitions of equipped gondolas will be lessened because of the incentive per diem on the plain gondola car, and even if acquisition of equipped gondolas did decrease, while plain gondolas increased, there is no evidence of record showing what, if any, detrimental effect this might have.

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[15] See *Incentive Per Diem Charges—1968*, 349 I.C.C. 303, 310 (1975), for a similar finding made in respect to covered hoppers.

We also note that while equipped gondola cars are not assigned to specific shippers in great numbers (only about 10 percent are assigned), they are dedicated to certain particular industries because of their specialized equipment and cannot be described as free running. Thus, another reason for not imposing IPD charges on the equipped gondola is because, on the record, the main benefit would accrue to only a limited number of industries and shippers. This is contrary to the broader basis specified in section 1(14)(a) of the act for imposition of incentive per diem, namely consideration of "factors affecting the adequacy of the national freight car supply." *Incentive Per Diem Charges—1968*, 349 I.C.C. 303, 311 (1975). Moreover, we disagree that equipped gondolas are like XF boxcars and thus should be accorded the benefit of the IPD charges. The inclusion of the XF boxcars into the IPD program in *Incentive Per Diem Charges—1968 (XF Cars), supra,* was not intended as a departure from or excpetion to the rule prohibiting IPD benefiting only a small segment of the shipping public. That proceeding was intended to halt a potentially dangerous and unanticipated side effect of limiting IPD to general purpose (XM) boxcars. Therein, we found that the failure to include in the IPD program boxcars suitable for food-quality usage would pose serious problems in the provision of clean, uncontaminated equipment for the movement of foodstuffs and could materially endanger the wholesomeness of our Nation's food supply.

Accordingly, we conclude that incentive per diem is not warranted on equipped gondola cars because the record makes no showing of any deleterious effect resulting from the failure to include equipped gondola cars under IPD regulations; IPD would benefit only a limited segment of the shipping public; and, most importantly, the equipped gondola supply is increasing, indicating that further investment incentive is not presently warranted.

IMPLEMENTATION OF IPD ON PLAIN GONDOLA CARS

Much of the objection to the IPD program is directed not to the general concept of an IPD charge but to regulations concerning the spending of such funds. In general, parties in opposition to the IPD program believe that unwarranted restrictions placed on the use of IPD funds has destroyed any meaningful incentive to acquire additional freight cars. A more flexible approach in IPD regulations on plain gondola cars is advocated.

Santa Fe believes that the Commission has misconceived the basic concept of economic incentive in construing its existing IPD program. It indicates that in order to make investment in a freight car attractive, an investor must be able to anticipate an acceptable return on investment when the car is off line. It believes, however, that when expenditure of the "return" is artificially restricted and is not available to meet other transportation needs of the investor as they arise, the IPD "return" is no return at all, and thus the restrictions the Commission has placed on expenditure of IPD funds acts to chill investment. It is asserted that a further chilling effect on investment inherent in the Commission's present IPD program is the lack of permanence in the system, evidenced most recently by return of IPD on boxcars to the former 6-month period. The Santa Fe questions how a railroad can justify investment in a freight car, ostensibly given "incentive" through IPD, when there is no reasonable assurance that IPD will remain in effect during normal amortization periods. Santa Fe concludes that if IPD funds are made available for any legitimate transportation purpose and if there is some assurance that IPD will continue on a 12-month basis for a substantial period of time, the congressional intent in amending section 1(14) will be realized.

The Penn Central[16] is opposed to IPD even though it is a creditor railroad, and also opposes earmarking and matching of funds. It claims that it is questionable whether the bankrupt northeast railroads will be able to meet a matching requirement. It argues that any expenditure of funds available should be management's judgment, whether placed in plant or equipment.

The Bureau states that the authority to draw down IPD balance should not be conditioned upon the observance of a test period investment average. It points out that the question whether expenditure of gondola funds should be restricted to the acquisition of additional gondolas lies within the Commission's discretion under section 1(14) of the act. It notes that section 1(14) does *not* require that IPD funds be spent solely for the acquisition of more IPD cars. The Bureau comments that while Penn Central's (Conrail's) fleet of gondola cars may well earn substantial IPD credits, that improved utilization of gondolas and other car types over the Conrail system will not depend on how many gondolas the system owns but on such things as roadbeds and track conditions and the sophistication of its yard facilities and car-control systems. The Bureau believes the Commission should consider, if it elects to establish IPD on gondolas, the creation of a special category of "expenditure conditions" whereby bankrupt or marginal roads would be granted more liberal spending requirements so as to allow expenditure of funds on other transportation needs beyond gondola cars. As an alternative, the Bureau states that if the Commission decides for policy reasons that expenditure of gondola IPD credits earned by bankrupt or marginal roads should be restricted to the acquisition of gondola cars, such restriction should not also be coupled with a matching requirement. The Bureau thinks it important to encourage the flow of IPD funds back into the transportation system in the form of equipment expenditures (or capital outlays or operating expenses) as quickly as possible. It foresees that imposition of matching requirements on bankrupt or marginal lines will mean, in all probability, that substantial sums of IPD monies will be held by banks over extended periods of time while the bankrupt or marginal roads are using other carrier funds to meet higher priority needs.

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[16] Now organized as Consolidated Rail Corporation (Conrail).

The Union Pacific strongly recommends that all incentive funds from whatever type of car derived, should be subject to a single earmarking and available to expenditure on all IPD car types—gondolas, plain boxcars, and XF cars. It also recommends that carriers for good cause be exempted from matching requirements.

Bearing in mind the above comments, as well as the fact that with the current reexamination of basic per diem under the 4R Act and AAR's work on fractional per diem, and that within several years the IPD program may substantially be modified or found unnecessary, it appears that a more flexible approach in regulations concerning the spending of IPD funds is warranted in this instance. At issue is whether there should be a matching provision, whether the IPD formula should be modified, what, if any, restrictions should be put on spending IPD funds, what time limitation should be put on the spending of IPD funds, and if funds are not spent within the time limitation should the funds go to Railbox, or should some other penalty be applied.

As previously discussed, when IPD was applied to boxcars, an average investment in cars, based on the past experience of a carrier for the years 1964-1968 was required by the carrier each year before it could draw down IPD funds. This requirement was for the purpose of ensuring that IPD funds would be spent for boxcars over and above what was normally purchased. However, because the 5-year average investment for some railroads was not representative of a normal investment, but was exaggerated, as in the case of the Union Pacific, the average investment requirement became a prohibition in spending of IPD funds. Subsequently, relief from the 5-year average investment requirement was allowed upon a showing of good cause whereby the carrier was required to spend at least an equal amount from its general funds as it spends from its net credit balance of IPD funds. See *Incentive Per Diem Charges—1968*, 349 I.C.C. 303, 315 (1975). And more recently the Commission allowed unrestricted relief from the 5-year average investment requirement by allowing the carriers the "option" of meeting their 1964-68 test period average on unequipped boxcars before drawing down incentive per diem funds or matching incentive per diem expenditures with general corporate funds. See *Incentive Per Diem Charges—1968*, 353 I.C.C. 336 (decided January 21, 1977).

When IPD was expanded to XF cars the average investment requirement was dropped and in lieu thereof was instituted the equal matching funds requirement. See *Incentive Per Diem Charges—1968 (XF Cars), supra.* The dropping of the average investment requirement of XF cars was necessary because the XF car did not exist before 1973. Thus, there were no average investment statistics. The matching funds requirement for XF cars was believed to encourage at least minimal corporate expenditures in addition to IPD expenditures of XF cars.

While a matching requirement would ensure that a minimum of corporate funds are spent beyond IPD funds, this alone seems little justification for the requirement, especially in view of the financial difficulty of northeast railroads. The real incentive to purchase is created by the return on investment and if that return is large enough, railroads will substantially spend both IPD funds and corporate funds on gondola cars regardless of matching. It is our belief that upon reviewing the existing table of per diem charges printed in 49 CFR 1036.2, which is applicable on both the boxcar and XF car, that expansion of the application of this table to the plain gondola car will produce, when applied on a year-round basis, an ample return on investment creating a strong incentive to purchase gondola cars. Because there are no seasonal shortages of plain gondola cars, unlike boxcars, a year-round application of IPD is warranted.

The table of IPD charges found in section 1036.2 of the CFR shows IPD charges on boxcars based on cost and age. This table provided for an incentive charge resulting in a 12-percent average annual return on investment (adding 6-percent basic per diem results in an 18-percent annual overall per diem return). Originally the table was applied to boxcars on a 6-month basis, thus resulting in a 12-percent average overall annual return (18 percent basic and incentive per diem for 6 months, 6 percent basic per diem for 6 months). When the Russian grain deal created large boxcar shortages the Commission by order applied the IPD table of charges on boxcars on a year-round basis thus resulting in an 18-percent average overall return of which 12 percent represented IPD charges. The court in *Ann Arbor Railroad Company* v. *United States*, 368 F. Supp. 101 (1973), upheld the 12-percent IPD charge as just and reasonable, and was affirmed *per curiam* by the Supreme Court in *Ann Arbor R. Co.* v. *United States*, 419 U.S. 807 (1974). Subsequent thereto, when a boxcar surplus resulted, the IPD boxcar charge became applicable once again only for 6 months of the year, effectively reducing IPD to a 6-percent return and a 12-percent overall per diem annual return on boxcars.

When IPD was expanded to XF cars, it was found that there was no seasonal shortage of such cars and the table of IPD charges would become applicable year round, which resulted in a 12-percent average IPD charge and an 18-percent overall per diem return. Thus, presently the rate of return on XF cars is 6 percent higher than plain boxcars. The Commission takes notice of considerable investment in boxcars and XF cars over the past year which would indicate that the return on investment for these cars creates a significant investment incentive.

We believe that the existing table of IPD charges (now applicable to boxcars on a 6-month basis and to XF cars on year-round basis) should be applied on a year-round basis to gondola cars. This would result in IPD charges based on a 12-percent annual return and an overall annual return of 18 percent. The higher 12-percent IPD return, compared to 6 percent for boxcars is warranted we believe due to the fact that revenue earned on gondolas because of the commodities hauled (scrap, aggregates, pulpwood) have been considerably lower than revenues on boxcars. Allowing the higher 12-percent IPD rate of return will not only substantially spur the incentive to purchase gondolas, but will conceivably create a more effective incentive to return gondolas to the owning railroads because of the larger differential between revenue earned and cost of borrowing the gondola car than now exists on boxcars.

In conclusion, we believe that an overall annual rate of return of 18 percent per diem will create a strong investment incentive to purchase gondola cars, so effective in fact that compulsory expenditures either by a matching funds approach or an average investment requirement will not be necessary. Thus, further justification for the higher rate on plain gondolas than on plain boxcars is the elimination of these prior compulsory spending restrictions. It is our hope that this proceeding will create a truly effective incentive to invest in plain gondolas, and that railroad management will have more freedom of choice of where to allocate their financial resources.

As to the issue of a limitation on the spending of IPD funds, it is our belief that a more flexible approach needs to be taken on the spending conditions of IPD funds generated. By expanding the use of the IPD funds beyond the car type generating the funds to other IPD car types we can avoid the situation where railroads have large amounts of unspent funds. Recognizing the problems of Conrail indicated by the Bureau we believe that IPD funds generated on gondola cars should be earmarked in a separate account, in the same method as boxcar IPD funds, and that such funds should be allowed to be expended on any IPD car type (boxcars, XF cars, and gondolas). While a similar flexibility on spending of funds generated on boxcars and XF cars is desirable, it is beyond the scope of this rulemaking proceeding. However, we will entertain petitions seeking such modification.

In order to allow even more flexibility, those railroads who have adequate car supplies or no reason to purchase additional IPD cars from funds generated by gondola cars will be allowed to petition the Commission to permit expenditure of such funds on plant and equipment upon a showing that expenditure of such funds will enhance utilization of any of the IPD car types.

Because we are in a temporary gondola surplus situation at the present time, we believe expansion beyond the current 18-month spending limitation on IPD funds is warranted. Thus, a 30-month spending requirement in which IPD funds will be required to be spent will be implemented. This will allow carriers to accumulate funds if the surplus situation persists in the short run. However, railroad carriers are encouraged to spend the funds within the specified time period and if they fail to do so they shall be penalized. In the case of boxcars, failure to spend IPD funds in 18 months theoretically results in a voluntary transfer of funds to Railbox. However, because Railbox does not currently include gondolas and because the effectiveness of this form of penalty is dubious, we believe a better inducement to the spending of IPD funds generated on plain gondolas will be the penalty provision that a carrier's failure to spend 85 percent of IPD funds within the 30-month time period, will result in that carrier not being allowed to earn incentive on plain gondola cars until such IPD funds have been expended.

Because of the possible "chilling effect" on the incentive to invest in gondola cars caused by the lack of permanence in the IPD program thus far, and the possibility of future modifications pursuant to section 212 of the 4R Act and the AAR fractional per diem study, it appears that a guaranteed return on investment in the form of IPD payments received on the purchase or leasing of new, plain gondola cars is warranted in order to create the desired investment incentive. Without such a guarantee the investment community would be understandably concerned whether the investment return from per diem charges would be sustained so as to return the cost of a new gondola car plus a reasonable profit. Thus, in order to eliminate the potential investment risks associated with subsequent modifications, newly purchased or leased gondola cars "delivered" after the effective date of this report and the attached order, will be guaranteed for a 15-year period to earn as minimum, a per diem return so as to maintain an equivalent of the current basic per diem charge plus the incentive per diem charge shown in 49 CFR 1036.2 and the attached order. A time limitation on the guarantee is deemed warranted since the Commission is reluctant to be bound to any guarantee ad infinitum. The 15-year period appears to be a reasonable length of time for the guarantee since this has been generally the term for repayment of the principal of equipment loans. Moreover, because under the existing table of IPD charges the owning carrier will collect at least 70 percent of the total incentive charges (in the first 15 years), we believe the 15-year time limitation, is reasonable and will not be detrimental to the incentive effect of the guarantee. Such guarantee will be subject to the caveat that for failure to spend 85 percent of the IPD generated funds within the 30-month time limit will result in the suspension of the guarantee and the payment of IPD charges to the owning carrier until the time that such funds are spent. Moreover, the Commission reserves the right to adjust the time limitation on spending, and spending percentage if warranted.

We emphasize that the "guaranteed" earning of IPD charges at the indicated rates is only applicable to new plain gondola cars that are delivered after the effective date of the report and the attached order. If the Commission in the future deems a subsequent modification of the IPD program to be warranted, either as a reduction or elimination of IPD charges, such action would not affect the per diem return on "guarantee" plain gondola cars as described herein. Such prospective modifications, however, would be applicable to plain gondola cars that have been delivered prior to the effective date of this report, and to future acquired plain gondola cars that have been "ordered" after the effective date of such subsequent modifications. Thus, railroads who make financial commitments and have placed "good and reasonable" orders for plain gondola cars after the effective date of this report do not need to be apprehensive that before the car is actually delivered that the IPD program on plain gondolas will be modified or eliminated. Once the order for the plain gondola is placed, the ordered car will be subject to the aforementioned guarantee.

In analyzing whether the above-described guarantee is a workable concept, we have to examine whether the guarantee will be administrable at that point in time when the general incentive per diem charges on plain gondola cars is either reduced or eliminated. The result of an elimination of the IPD charge on the gondola car would be that only plain gondolas that were guaranteed would theoretically earn IPD charges. Administering such a guarantee would not be difficult, since the carriers by being cognizant of the age of their plain gondola fleets could easily keep account of which cars are entitled to the extra IPD guaranteed charge. The administration of the guarantee aspect of the incentive per diem program would be relatively simple. Each plain gondola car acquired and given the status of a guaranteed car would have the letter "I" affixed to the mechanical designation, "GBI".

These cars would be registered in the UMLER file as guaranteed unequipped gondola cars and would be assured of a 15-year period to collect incentive per diem.

One problem, however, that we can envision under such an approach would be the possible discrimination between guaranteed and nonguaranteed gondola cars. If the differential in earnings while off line is significant between the guaranteed and nonguaranteed cars this could result in discriminatory practices concerning such cars. For example, it is conceivable that the owning railroads would attempt to send guarantee gondola cars rather than nonguarantee gondola cars over the lines of other carriers in order to earn the additional incentive per diem. This of course would adversely affect the utilization of the gondola fleet. In order to prevent such a situation the guaranteed IPD could be generated on a carrier's entire fleet of plain gondola cars rather than the specific individual guaranteed cars. For example, if a railroad has a fleet of 500 plain gondola cars of which 100 are guaranteed, by computing the average IPD charge for the 100 guaranteed cars based on the average age of the group and then multiplying this average charge by the ratio of guaranteed cars to the carrier's entire plain gondola fleet, the result is an IPD charge that can be applied to the entire fleet.

The following chart demonstrates this procedure.

Railroad X Car supply	Days off line	Hypothetical average IPD guaranteed car charge	Computed IPD charge for fleet	IPD earned
100 Guaranteed cars	150 x	$2	....	$300
400 Nonguaranteed cars	600	-------	....	
500 Plain gondola car fleet	750 x	......	$(\$2x\frac{100}{500}) = \$0.40$	$300

The above chart shows that under the above-described formula the entire fleet will generate the same amount of revenue ($300) as the individual guaranteed cars would generate. Of course the above formula assumes that guaranteed and nonguaranteed cars have the same frequency of days off-line. Such an assumption is not unreasonable. Moreover, the advantage of the formula is that by spreading the IPD charges over the entire fleet utilization may actually be enhanced.

It would be premature for the Commission to indicate now which of the two methods of generating guarantee IPD funds (that is, on the individual guaranteed cars or by the entire plain gondola fleet) will be implemented when the general IPD program on plain gondolas is removed or modified. Such factors as the size of the guaranteed fleet and the level of basic and incentive per diem charges are some of the factors that will have to be considered in light of the then existing circumstances. The guarantee will be preserved after the IPD program is terminated, regardless of the method used to achieve that purpose.

GENERAL OBSERVATIONS

The factual evidence submitted in the record supports our conclusion that the Nation's plain gondola car supply is inadequate to meet the future needs of commerce. We have attempted herein to construct a viable incentive per diem program under which additional gondolas will be purchased. In so doing, we have identified some of the problems and inequities existing in the IPD program on boxcars and have sought to improve upon them. Basically, we have focused upon the "incentive element" in hope of stimulating gondola investment by making the investment more attractive, rather than coercing the railroads to purchase gondolas by a matching requirement or by meeting a past investment average. We believe this approach is more palatable to the railroad industry, and that it is the most effective means of encouraging railroad investment in gondolas.

The rules and regulations in the attached order and discussed in the report pertain to the gondola car and do not affect the spending procedures of IPD funds collected on boxcars and XF cars. While it appears that there may be justification for reforming the spending requirements for boxcars and XF cars somewhat similar to those adopted herein, or that the entire IPD program be combined into a single fund, the implementation of these suggestions is beyond the scope of this rulemaking proceeding. As previously indicated, the Commission is currently reviewing the basic per diem formula under section 212 of the 4R Act and will take the above suggestions into consideration.

We do not endorse the above suggestions at this time but merely mention them to stimulate consideration of other alternatives to the present IPD program. We are not so presumptious to believe that the existing IPD programs and the changes herein are without imperfections. Accordingly, the parties to this proceeding are notified that this proceeding is "open ended," and that the Commission will evaluate the effectiveness of the incentive gondola program in light of actual experience and will make further modifications as warranted.

ULTIMATE FINDINGS

We find and conclude that the implementation of an incentive per diem charge on plain gondola cars as described in this report and the regulations thereto found in appendix I, will contribute to sound car service practices, including efficient utilization and distribution of cars, and encourage the acquisition and maintenance of a car supply adequate to meet the needs of commerce and the national defense.

An appropriate order will be entered.

COMMISSIONER MURPHY, concurring in part:

I am in agreement with the majority to the extent that it finds that there is a continuing shortage of plain gondolas and that the incentive per diem program should be extended to that type of freight car.

It is abundantly clear from the record that there has been a continuous and sharp decline in the ownership of plain gondolas by the railroads. See, also, *Investigation of Adequacy of Freight Car Ownership*, 335 I.C.C. 264, 335 I.C.C. 874. The numerous periods in which shortages of plain gondolas necessitated action by the Association of American Railroads in relocating gondolas also attest to the existence of a situation particularly amenable to correction under section 1(14)(a) of the Interstate Commerce Act, as amended. Finally, it is important to note that the investigation into a possible extension of the incentive per diem program was instituted largely in response to petitions of several railroad respondents. While normally managerial initiative is left to the discretion of railroad management, *Hanna Mining Co.* v. *Missouri Pac. R. Co.*, 332 I.C.C. 166, the Commission has not hesitated to take corrective action where it is apparent that the railroads are unwilling or unable to meet their obligations under the act. The petitions herein appropriately seek Commission action for the purpose of improving the car supply.

My principal disagreement with the majority's decision lies with the conditions attached to the use of the accrued funds. Instead of simple, easily understood conditions, the regulations adopted today are complex, confusing, inconsistent with prior determinations (cf., *Incentive Per Diem Charges—1968*, 349 I.C.C. 303, 311), and will undoubtedly require further clarification by the Commission. Simpler conditions would not only aid respondents in improving the Nation's car supply but would also make the Commission's task much easier.

COMMISSIONER CHRISTIAN, dissenting in part:

I agree with the majority that an added incentive to promote the purchase of gondola cars is necessary. However, I am troubled by the timing and design of the program which has been adopted.

The report wisely acknowledges the need for a thorough review of our basic and incentive per diem programs. It is imperative that both of these programs be reevaluated to be sure that they are meeting their intended goals. I do not advocate delaying our action in this proceeding until the reevaluation is completed but I do believe we should avoid actions which will further complicate that process.

In my view, the 15-year guarantee of current basic and incentive per diem charges is inconsistent with the statutory concept of incentive per diem. I also believe that the guarantee will further blur the distinction between basic and incentive per diem charges. It seems unwise to tinker with investment decisions without first examining whether adequate basic per diem charges would solve this problem.

APPENDIX A

The following parties are in general support of the proposal to extend IPD charges to plain gondola cars.

American Iron & Steel Institute
The Atchison, Topeka and Santa Fe Railway Company
The Bureau of Investigations and Enforcement of the Interstate Commerce Commission
CP Rail and Canadian National Railways
The Chessie System
Construction Aggregate Rail Shippers Conference, Inc.
David J. Joseph Company
The Denver and Rio Grande Western Railroad Company
Ford Motor Co.
Institute for Scrap Iron and Steel, Inc.
Louisville and Nashville Railroad Company
The National Industrial Traffic League
Norfolk & Western Railway Company
The Pittsburgh and Lake Erie Railroad Company
Seaboard Coast Line Railroad Company
Union Pacific Railroad Company
United States Steel Corporation
Vulcan Materials Company

The following parties are in general opposition to the proposal.

Chicago, Milwaukee, St. Paul and Pacific Railroad Company
Chicago and North Western Transportation Company
Chicago, Rock Island and Pacific Railroad Company (trustee)
Delaware and Hudson Railway Company
Detroit, Toledo and Ironton Railroad Company
Florida East Coast Railway Company
Illinois Central Gulf Railroad Company
Kansas City Southern Lines
Missouri Pacific Railroad Company
Penn Central Transportation Company (trustees)
Soo Line Railroad Company
Southern Pacific Transportation Company

The Southern Railway Company takes no position on the proposal.

APPENDIX B

Gondola Shortages and Surpluses—January 1, 1971, through December 31, 1975

	Plain gondolas under 61 ft.		Plain gondolas 61 ft. or longer		Equipped gondolas		Total gondolas	
	Shortages	Surpluses	Shortages	Surpluses	Shortages	Surpluses	Shortages	Surpluses
1971								
1st Quarter	2,557	60	457	------	57	56	3,071	116
2nd Quarter	1,159	60	137	------	15	52	1,311	112
3rd Quarter	134	4,664	------	1,115	------	1,020	134	6,799
4th Quarter	6	10,378	------	1,756	2	759	8	12,893
1972								
1st Quarter	263	962	2	857	5	253	270	2,072
2nd Quarter	241	1,229	------	693	------	336	241	2,258
3rd Quarter	570	1,221	55	457	75	292	700	1,970
4th Quarter	375	569	100	111	206	166	681	846
1973								
1st Quarter	2,082	74	214	14	489	------	2,785	88
2nd Quarter	2,374	60	288	------	198	4	2,860	64
3rd Quarter	2,750	60	369	------	340	44	3,459	104
4th Quarter	3,040	------	251	23	508	3	3,799	26
1974								
1st Quarter	5,692	------	578	------	721	3	6,991	3
2nd Quarter	3,660	------	429	16	340	7	4,429	23
3rd Quarter	3,390	------	301	12	289	44	3,980	56
4th Quarter	623	365	105	83	27	125	755	573

Gondola Shortages and Surpluses—January 1, 1971, through December 31, 1975—Continued

	Plain gondolas under 61 ft		Plain gondolas 61 ft or longer		Equipped gondolas		Total gondolas	
	Shortages	Surpluses	Shortages	Surpluses	Shortages	Surpluses	Shortages	Surpluses
1975								
January	1,101	558	85	71	70	45	1,256	674
February	1,300	597	150	77	69	17	1,519	691
March	1,032	626	156	62	27	200	1,215	888
April	386	641	8	33	6	233	400	907
May	150	680	9	303	11	665	170	1,648
June	68	1,910	4	769	59	789	131	3,468
July	----------	7,177	1	1,959	5	1,868	6	11,004
August	45	5,808	----------	1,718	76	1,569	121	9,095
September	75	2,381	13	839	259	1,105	347	4,325
Averages								
1971	991	2,533	146	480	33	418	1,170	3,432
1972	351	2,107	18	808	32	287	401	3,201
1973	2,380	110	237	40	394	18	3,011	168
1974	3,873	30	382	16	492	18	4,747	64
1975	344	2,542	36	874	42	995	422	4,411

Source: AAR CS-44 "Average Daily Freight Car Shortages and Surplus."

Plain Gondola Shortages

Week ending	Surplus	Shortage	Balance
Jan. 3, 1970	24	1,025	- 1,001
Feb. 7, 1970	3	2,280	- 2,277
Mar. 7, 1970	41	2,843	- 2,802
April 4, 1970	30	2,546	- 2,516
May 2, 1970	25	2,842	- 2,817
June 6, 1970	23	2,421	- 2,398
July 4, 1970	26	2,102	- 2,076
Aug. 1, 1970	15	1,469	- 1,454
Sept. 5, 1970	4	1,136	- 1,132
October 3, 1970	23	961	- 938
Nov. 7, 1970	583	276	+ 307
Dec. 5, 1970	1,288	261	+ 1,027
Jan. 2, 1971	476	165	+ 311
Feb. 6, 1971	0	1,832	- 1,832
Mar. 6, 1971	5	2,794	- 2,789
April 3, 1971	60	3,014	- 2,954
May 1, 1971	60	2,453	- 2,393
June 5, 1971	60	2,174	- 2,114
July 3, 1971	60	1,296	- 1,236
Aug. 7, 1971	4,802	162	+ 4,640
Sept. 4, 1971	7,278	100	+ 7,178
Oct. 2, 1971	5,779	134	+ 5,645
Nov. 6, 1971	7,598	96	+ 7,502
Dec. 4, 1971	8,261	12	+ 8,249
Jan. 1, 1972	12,134	6	+12,128
Feb. 5, 1972	6,461	106	+ 6,355
Mar. 4, 1972	2,964	202	+ 2,762
April 1, 1972	1,819	265	+ 1,554
May 6, 1972	1,529	266	+ 1,263
June 3, 1972	1,953	248	+ 1,705
July 1, 1972	1,922	241	+ 1,681
Aug. 5, 1972	4,447	396	+ 4,051
Sept. 2, 1972	2,837	636	+ 2,201
Oct. 7, 1972	1,382	595	+ 787
Nov. 4, 1972	1,097	743	+ 354
Dec. 2, 1972	1,300	415	+ 885
Jan 6, 1973	660	458	+ 202
Feb. 3, 1973	529	949	- 420
Mar. 3, 1973	63	2,327	- 2,264
April 7, 1973	84	2,253	- 2,169

Plain Gondola Shortages

Week ending	Surplus	Shortages	Balance
May 5, 1973	60	2,312	- 2,252
June 2, 1973	60	2,645	- 2,585
July 7, 1973	66	2,662	- 2,596
Aug. 4, 1973	113	2,230	- 2,117
Sept. 1, 1973	80	2,230	- 2,150
Oct. 6, 1973	60	3,441	- 3,381
Nov. 3, 1973	38	4,114	- 4,076
Dec. 1, 1973	52	4,080	- 4,028
Jan. 5, 1974	40	3,685	- 3,645
Feb. 2, 1974	0	5,042	- 5,042
Mar. 2, 1974	0	6,125	- 6,125
April 6, 1974	0	6,261	- 6,261
May 4, 1974	0	5,760	- 5,760
June 1, 1974	0	4,365	- 4,365
July 6, 1974	132	3,735	- 3,603
Aug. 3, 1974	111	3,288	- 3,177
Sept. 7, 1974	27	3,241	- 3,214
Oct. 5, 1974	18	3,811	- 3,793
Nov. 2, 1974	41	3,805	- 3,764
Dec. 7, 1974	70	2,473	- 2,403
Jan. 4, 1975	332	741	- 409
Feb. 1, 1975	629	1,186	- 557
Mar. 1, 1975	674	1,450	- 776
April 5, 1975	659	986	- 327
May 3, 1975	674	394	+ 280
June 7, 1975	1,407	149	+ 1,258
July 5, 1975	4,505	45	+ 4,460
Aug. 2, 1975	9,136	1	+ 9,135
Sept. 6, 1975	6,535	47	+ 6,488
Oct. 4, 1975	2,814	82	+ 2,732
Nov. 1, 1975	3,466	10	+ 3,456
Dec. 6, 1975	6,369	20	+ 6,349
Jan. 3, 1976	10,208	4	+10,204
Feb. 7, 1976	5,744	159	+ 5,585
Mar. 6, 1976	3,440	589	+ 2,851
April 3, 1976	3,109	523	+ 2,586
May 1, 1976	2,728	511	+ 2,217
June 5, 1976	2,425	671	+ 1,754
July 3, 1976	2,072	680	+ 1,392
August 7, 1976	2,401	554	+ 1,847
Sept. 4, 1976	2,384	519	+ 1,865
Oct. 2, 1976	1,815	693	+ 1,122
Nov. 6, 1976	2,290	544	+ 1,745
Dec. 4, 1976	3,793	76	+ 3,717

Source: AAR CS-44-C Report.

APPENDIX C

U.S. ownership—gondolas class I railroads

Year	Under 61 feet	Over 61 feet	Sub total	Equipped	Grand total
January 1:					
1956					280,306
1957					277,430
1958					278,007
1959					278,854
1960					271,626
1961					266,534
1962					256,749
1963					249,618
1964					237,127
1965					223,681
1966					214,679
1967					207,077
1968	162,847	14,047	176,894	23,202	200,096
1969	158,253	15,032	173,285	23,802	197,087
1970	152,206	14,681	166,887	25,351	192,238
1971	148,091	14,446	162,537	24,892	187,429
1972	144,464	14,282	158,746	24,766	183,512
1973	141,641	14,289	155,930	26,406	182,336
1974	137,394	14,003	151,397	28,216	179,613
1975	134,770	14,108	148,878	28,456	177,344

Sources: Ex Parte No. 241, *Investigation of Adequacy of Railroad Freight Car Ownership*, 335 I.C.C. 264 (1969), for Jan. 1, 1956-Jan. 1, 1965. AAR CS 60-A reports for Jan. 1, 1966-Jan. 1, 1975.

APPENDIX D

Gondola capacity (class I U.S. railroads)

Year[1]	Average capacity per gondola car	Aggregate gondola fleet carrying capacity
	Tons	*Tons*
1945	55.39	19,129,213
1950	57.13	16,958,526
1955	59.83	17,602,106
1960	61.72	16,764,757
1961	62.12	16,557,092
1962	62.00	15,918,438
1963	62.69	15,648,552
1964	62.88	14,910,546

Gondola capacity (class I U.S. railroads)—Continued

Year[1]	Average capacity per gondola car	Aggregate gondola fleet carrying capacity
	Tons	*Tons*
1965	63.27	14,151,841
1966	64.37	13,819,429
1967	65.48	13,559,654
1968	67.10	13,426,584
1969	68.69	13,538,179
1970	69.82	13,422,746
1971	71.93	13,481,503
1972	72.59	13,320,322
1973	73.94	13,481,924
1974	74.65	13,408,110
1975	75.74	13,431,277

Source: AAR Report CS-11.

[1] As of January 1 of the year.

APPENDIX E

Gondola utilization

Year	Average trips (loads) per car per year	Number of days between loads
1965	19.2	19.0
1966	19.1	19.1
1967	18.6	19.6
1968	18.5	19.7
1969	18.9	19.3
1970	19.1	19.1
1971	17.6	20.7
1972	18.8	19.4
1973	20.6	17.7
1974	20.0	18.3

Source: Association of American Railroad Car Service Statistics.

APPENDIX F

Rail equipment as of October 1, 1975

Age	Gondolas					
	Plain			Equipped		
	Nation	Percent of total	Accumulative percentage	Nation	Percent of total	Accumulative percentage
Years						
0-10	56,326	36.0	36.0	16,948	56.8	56.8
11-20	38,648	24.7	60.7	4,660	15.6	72.4
21-30	51,448	32.8	93.5	5,650	18.9	91.3
31-40	7,735	4.9	98.4	2,316	7.8	99.1
41-50	2,060	1.3	99.7	255	0.9	100.0
51-60	404	0.3	100.0	9	....	....
Over 60	35	....	....	....	....	....
Total	156,656	100.0	....	29,838	100.0	....
Average age	16.7			13.3		

	Gondolas plain and equipped
	Nation
Total	186,494
Average age	16.1

Source: UMLER file listing, AAR

APPENDIX G

Changes in gondola ownership (class I U.S. railroads)

Year	New and rebuilt	Retired	Net deficit
1964	2,040	15,486	13,446
1965	5,615	11,654	6,039
1966	7,152	14,754	7,602
1967	7,535	14,516	6,981
1968	7,779	10,788	3,009
1969	5,299	10,148	4,849
1970	7,091	11,900	4,809
1971	4,376	8,293	3,917
1972	6,599	7,775	1,176
1973	2,372	5,095	2,723
1974	2,619	4,898	2,279

Source: AAR Report CS-11

APPENDIX H

TABLE 1—*Estimates of traffic, car fleet, shortages and excess of plain gondola cars—1970-1985*

Year	Traffic (1,000 carloads)	Number of cars owned (1,000)	Rate of utiliza-tion (cars/year)	Number of cars shortages (per day)	Number of cars excesses (per day)	Net shortages (per day)
1970	2,623	171.7	15.32	1,667	167	1,500
1971	2,352	167.8	14.02	1,137	3,013	(-1,876)
1972	2,417	164.7	17.50	370	2,915	(-2,545)
1973	2,615	162.1	19.18	2,617	150	2,467
1974	2,552	158.8	16.07	4,255	47	4,208
1975	2,023	157.9	12.81	380	3,416	3,036
1976	2,250	156.5	14.38	497	1,598	(-1,101) estimated
1977	2,502	154.8	16.16	1,301	573	728
1978	2,428	152.3	15.94	1,593	172	1,421
1979	2,405	150.9	15.94	1,430	983	447
1980	2,683	149.7	17.92	1,721	621	1,100
1981	2,718	150.2	18.09	3,215	294	2,921
1982	2,565	147.4	17.40	3,234	571	2,663
1983	2,800	143.6	19.50	3,038	490	2,548
1984	2,712	141.8	19.12	4,542	286	4,256
1985	2,528	143.7	17.60	4,036	401	3,635

Source material: see page 2 of appendix H

EXPLANATION OF GONDOLA SHORTAGE PROJECTION

The preceding table of estimated shortages represents all plain gondola cars based on a revised forecast of gondola ownership developed from the age distribution of the fleet. The table projects carloading demand as well as average daily shortages and surpluses through 1985. An econometric model was employed to identify which economic indicators[1] were major determinants of the demand for carloadings. The major factors found to be significant were production indexes of the steel industry (SIC 331) and the nonmetallic minerals industry (SIC 14). The projections for these production indexes were obtained from the June 1976 forecast of Data Resources Incorporated (DRI). The firm is well known in the field of economic forecasting. The carloading-demand model also included a time variable to adjust for the trend in larger carrying capacity of gondola cars. Hence, the demand for carloads in 1985 is a demand for cars that are much larger than cars available in 1965.

The forecast on gondola ownership includes cars from class I railroads, other railroads, and private owners. Retirements were developed from the age distribution and a review of past retirement behavior during cyclical fluctuations in the business cycle. Railroads are shown to tend to delay retirements during years when the demand for cars is heavy. A ratio of carloading to total ownership was used as a proxy for the equipment utilization rate. The proxy utilization rate was used to project surpluses and shortages. The utilization proxy is consistent with the more traditional measures of utilization, "turnaround time" and "number of trips per year," since when the proxy and the traditional measures are examined over time they are found to be highly correlated.

The result of the projection indicates car surpluses and shortages as well as the net balances. While a surplus car cannot be used to satisfy a car shortage, the net shortage or surplus figure can be used as an indication of service quality.

APPENDIX I

Revised rules and regulations

PART 1036—INCENTIVE PER DIEM CHARGES ON BOXCARS AND GONDOLA CARS

§1036.1 *Application.*—Each common carrier by railroad subject to the Interstate Commerce Act shall pay to the owning railroads, including the owning railroads of Canada, the additional per diem charges set forth in §1036.2 on all boxcars and gondola cars shown below, while in the possession of nonowning railroads and subject to per diem rules. These charges are in addition to all other per diem charges currently in effect or prescribed. Mexican-owned cars are exempt from the operation of these rules. The rules of this part shall apply regardless of whether the foregoing boxcars and gondola cars are in intrastate, interstate, or foreign commerce.

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[1] Protestants objected to earlier testimony where GNP was mentioned as an economic indicator of these determinants. At no time was GNP used directly in the forecast of gondola traffic. However, economists at DRI use GNP in their forecast of production indexes.

Mechanical designation	*Code number*
XM	B-100-109, B200-209, B300-309
XMI	B110-119, B210-219, B310-319
XMIH	B120-129, B220-229, B320-329
XF	A120, A220, A320, A420
GB	G111, G112, G211, G212
	G311, G312, G411, G412
	G121, G122, G221, G222
	G321, G322, G421, G422
	G131, G132, G231, G232
	G331, G332, G431, G432
	G141, G142, G241, G242
	G341, G342, G441, G442

(Plain gondola cars acquired after July 1, 1977, which are "guaranteed" cars and will be subject to incentive per diem payments from the date placed in service for a period of at least 15 years, should bear the letter designation GBI).

§1036.2 *Amount of incentive charge.* -The incentive charges applicable in each cost bracket by age group are set forth below:

AMOUNT OF INCENTIVE PER DIEM COLLECTIBLE ON UNEQUIPPED BOXCARS FOR A 6-MONTH PERIOD FROM SEPTEMBER 1 OF EACH YEAR THROUGH FEBRUARY 28 OF THE FOLLOWING YEAR AND A YEAR-ROUND BASIS FOR XF CARS AND UNEQUIPPED GONDOLA CARS

Line No.	Cost bracket (1)	Group A 0-5 years (2)	Group B 6-10 years (3)	Group C 11-15 years (4)	Group D 16-20 years (5)	Group E 21-25 years (6)	Group F 26-30 years (7)	Group G over 30 years (8)
1	0-$1,000	$0.32	$0.27	$0.22	$0.17	$0.11	$0.06	$0.04
2	$1,000-$3,000	.65	.54	.44	.33	.23	.12	.07
3	$3,000-$5,000	1.30	1.09	.88	.67	.46	.25	.14
4	$5,000-$7,000	1.95	1.63	1.32	1.00	.68	.37	.21
5	$7,000-$9,000	2.60	2.18	1.76	1.33	.91	.49	.28
6	$9,000-$11,000	3.25	2.72	2.19	1.67	1.14	.61	.35
7	$11,000-$13,000	3.90	3.26	2.63	2.00	1.37	.74	.42
8	$13,000-$15,000	4.54	3.81	3.07	2.33	1.60	.86	.49
9	$15,000-$17,000	5.19	4.35	3.51	2.67	1.82	.98	.56
10	$17,000-$19,000	5.84	4.89	3.95	3.00	2.05	1.11	.63
11	$19,000-$21,000	6.49	5.44	4.39	3.33	2.28	1.23	.70
12	$21,000-$23,000	7.14	5.98	4.82	3.67	2.51	1.35	.77
13	$23,000-$25,000	7.79	6.53	5.26	4.00	2.74	1.47	.84
14	$25,000-$27,000	8.44	7.07	5.70	4.33	2.96	1.60	.91
15	$27,000-$29,000	9.09	7.61	6.14	4.67	3.19	1.72	.98
16	$29,000-$31,000	9.74	8.16	6.58	5.00	3.42	1.84	1.05
17	$31,000-$33,000	10.39	8.70	7.02	5.33	3.65	1.96	1.19
18	$33,000-$35,000	11.04	9.24	7.46	5.67	3.88	2.09	1.12
19	$35,000-$37,000	11.69	9.79	7.89	6.00	4.10	2.21	1.26
20	$37,000-$39,000	12.33	10.33	8.33	6.33	4.33	2.33	1.33
21	$39,000-$41,000	12.98	10.88	8.77	6.67	4.56	2.46	1.40

§1036.3 *Earmarking.*—Each common carrier by railroad shall segregate in Account 716, Capital and Other Reserve Funds, and shall transfer from Account 798, Retained Income, Unappropriated to Account 797, Retained Income, Appropriated, an amount equal to the net credit balance resulting from any incentive per diem settlement involving boxcars and gondola cars subject to this part. The carrier shall maintain separate bank accounts for the segregated funds generated on boxcars and gondola cars, respectively. Canadian carriers shall transfer a net balance after taxes to a U.S. designee, which may be either a U.S. class I railroad or a U.S. corporation established solely to purchase, hold title to, and control general service, unequipped boxcars and unequipped gondola cars subject to the Department of Transportation's safety regulations and the Interstate Commerce Commission's rules pertaining to per diem and car service, and to any reporting requirements determined to be applicable by the Commission's Bureau of Accounts. If the designee of Canadian carriers is a U.S. railroad, it shall maintain separate accounts for funds received on Canadian-owned boxcars and gondola cars, respectively. All boxcars or gondola cars purchased or built by such designee or such other corporation with incentive per diem funds earned on Canadian boxcars or gondola cars must be built in the United States. Any U.S. taxes incurred after transfer of a net balance to such designee may be deducted from the transferred amount for the purpose of determining a final net balance for investment. The earmarked funds shall be reduced by the amount of the additional income tax paid as the result of increasing taxable income by inclusion of net incentive per diem earnings. The funds in such accounts shall be used as set forth in §1036.4 and §1036.5. Unexpended funds remaining in the accounts of the carriers may be invested in Government bonds or other interest-bearing, temporary securities. The interest earned thereafter shall become part of the earmarked funds.

§1036.4 *Use of funds on boxcars.*—The net credit balances resulting from incentive per diem settlements on boxcars, which are earmarked in accordance with §1036.3, may be drawn down in whole or in part at any time by the carrier to build, lease equivalent of purchase, purchase, or lease in which a carrier is not acquiring an equity interest, in whole or in part, new unequipped boxcars for general service described in §1036.1, or rebuild any number of portion of unequipped boxcars for general service described in §1036.1, provided, the carrier has in the same calendar year built, leased, purchased, nonequity leased, or rebuilt its 1964-68 average number of such boxcars and made up any arrearage in having failed to maintain such average each year this order is in effect. A carrier may, as an alternative to the 1964-68 test period average, draw down earmarked funds in whole or in part, to build, lease, equivalent of purchase, purchase, or nonequity lease new unequipped boxcars for general service or rebuild unequipped boxcars for general service provided, as a minimum, it matches the earmarked funds it will use to obtain these boxcars with an equal amount of its own funds. Where matching funds are to be used to acquire boxcars, such matching funds may not include funds derived from the increases authorized in Ex Parte No. 305 without specific authority from the Commission. Net balances on Canadian-owned cars may be drawn down without regard to prior acquisitions, but where the designee is a class I U.S. carrier such drawdowns shall not affect that carrier's accumulation of arrearages. A carrier using earmarked funds, in whole or in part, to build, rebuild, lease, purchase or nonequity lease general service, unequipped boxcars of the XF designation, shall only be required, as a minimum, to match the earmarked funds it will use to obtain these XF boxcars with an equal amount of its own funds. Nonequity leases for unequipped boxcars for general service and XF boxcars must be at least 10 years in duration and, in connection with such leases, earmarked funds must not be used for the cost of maintenance nor on leases entered into prior to January 1, 1975. All earmarked funds that have accured since the inception of the incentive per diem program must be put to use within 18 months after the end of the calendar year in which the funds are collected and result in a net credit balance for the building, rebuilding, leasing, purchasing or nonequity leasing of general service, unequipped boxcars described in §1036.1 for addition to such carrier's or designee's fleet in accordance with this part. Upon a showing of good cause an application, including a showing that the parties to the proceeding herein have been notified by the carrier of such application, may be made to the Commission for waiver of the said 18-month period, which may, in the Commission's discretion, be granted after consideration of all views regarding the application. If the earmarked funds are not used within the 18-month period, they may be voluntarily surrendered to Rail Box whose establishment and operation was approved in American Rail Box Car Co.—Pooling, 347 I.C.C. 862. If the carrier fails within the stated period to put to use collected earmarked funds which result in a net credit balance, has not obtained relief from that requirement, and has not surrendered such funds to Rail Box, the Commission will investigate the matter to determine what, if any, corrective action is warranted. Appropriate corrective action would include section 16(12) remedies among others. Carriers may make temporary investment of unexpended funds in Government bonds or other liquid securities. Such securities must be readily convertible to cash so that funds remain available for boxcar purchases. Interest earned must become part of the earmarked fund. As used in this section and §1036.5, "build," "rebuild," "lease," or "purchase" refer to a commitment to build, rebuild, lease, or purchase which results in the acquisition of a car on line ready for use within 10 months from the date of commitment, except that in extraordinary cases beyond the control of the carrier or the car supplier, a car that is delivered after 10 months from the date of commitment may qualify if approved by the Bureau of Accounts of this Commission.

§1036.5 *Use of funds generated on gondola cars.*—The net credit balances resulting from incentive per diem settlements generated on general service unequipped gondola cars described in §1036.1, which are earmarked in accordance with §1036.3, may be drawn down in whole or in part at any time by the carrier, or designee of a Canadian railroad, to build, lease equivalent to purchase, lease (nonequity), purchase in whole or in part, or rebuild unequipped gondolas, unequipped boxcars and XF cars as described in §1036.1. The nonequity leases must be entered into after January 1, 1977, be at least 10 years in duration, and in connection with such leases, earmarked funds must not be used for the cost of maintenance. Upon application to the Commission, common carriers by railroad which have either adequate car supplies or good cause for not purchasing additional incentive per diem cars described in §1036.1 from funds generated by unequipped gondola cars, may apply to the Commission to permit expenditure of such funds on plant and equipment, upon a showing that expenditure of such funds will enhance utilization of any of the car types earning incentive per diem. Earmarked funds must be put to use within 30 months after the end of the calendar year in which the funds are collected. Failure to spend 85 percent of the incentive per diem funds within the 30-month time period by a carrier will result in that carrier not being allowed to earn incentive per diem charges on its unequipped gondola cars until such earmarked funds have been expended.

§1036.6 *Guarantee of incentive per diem charges on new unequipped gondola cars.*—Newly purchase or leased (equity and nonequity) unequipped gondola cars described in §1036.1 which have been delivered after July 1, 1977, will be guaranteed to earn for 15 years from the date of delivery, as a minimum, such incentive per diem charges so as to maintain an equivalent of the current basic per diem charge as prescribed in I.C.C. Docket No. 33145, effective February 1, 1976, *plus* the applicable incentive per diem charge set forth in 49 CFR 1036.2. Such guarantee will be subject to the caveat that for failure of a carrier to spend 85 percent of its incentive per diem funds generated on unequipped gondola cars will result in the suspension of the guarantee until the time such funds are spent.

§1036.7 *Effective date.*—The rules set forth in §1036.1 and §1036.2 shall apply for a 6-month period from September 1 of each year through February 28 of the following year on general service, unequipped boxcars, and on a year-round basis for XF cars. The rules set forth in §§1036.1, 1036.2, 1036.3, 1036.5, and 1036.6 shall apply on a year-round basis for gondola cars, effective July 1, 1977.

§1036.8 *Rules and regulations suspended.*—The operation of all rules and regulations, insofar as they conflict with the provisions of this part, is hereby suspended. The charges herein provided shall be paid for each day cars are held, but nothing in this part shall prevent the operation of per diem reclaim agreements customarily employed by and between particular railroads to provide for special situations, or with the use of customary methods of settling balances of per diem accounts.

353 I.C.C.

INVESTIGATION AND SUSPENSION DOCKET NO. 9117

STRUCTURAL STEEL, ORANGE, TEX., TO BROOKLYN, N.Y.

Decided April 13, 1977

Upon reconsideration, proposed schedules found unlawful since beyond the scope of operating authority. Proceeding ordered discontinued.

Gordon P. MacDougall for respondents.

REPORT AND ORDER OF THE COMMISSION ON RECONSIDERATION

DIVISION 2, ACTING AS AN APPELLATE DIVISION,
COMMISSIONERS HARDIN, O'NEAL, AND CHRISTIAN

BY THE DIVISION:

The modified procedure was followed. A petition for reconsideration of the Report and Order of Review Board Number 4, decided October 7, 1976, was filed by respondents American Commercial Barge Line Company (ACBL) and McAllister Transport Lines, Inc. (MCBL), on November 12, 1976. The petition was granted, and the proceeding was reopened on the present record by our order of January 19, 1977.

Our ultimate findings differ from those of Review Board No. 4. However, the statement of facts in the review board's report is correct in all material respects, and as supplemented herein we adopt it as our own. The facts will be restated to the extent necessary for discussion.

By schedules filed to become effective May 16, 1976, ACBL proposed in its Joint All-Water Freight Tariff, I.C.C. No. 52, a joint lump-sum towing rate of $74,900[1] on structural steel, viz: modular (supertanker) sections, from Orange, Tex., to Brooklyn, N.Y. The tariff was to expire by its own terms July 31, 1976. According to the routing specified in the tariff, the movement was to be performed by ACBL from Orange, Tex., to Tampa, Fla., and by MCBL from Tampa to Brooklyn, N.Y. Moran Towing & Transportation Company, Inc., filed a protest to the proposed schedules asserting that MCBL did not hold proper authority to perform its assigned portion of the movement; specifically, it contended that MCBL was not authorized to serve Tampa, Fla., and other points and ports on the west coast of Florida. The operation of the proposed schedules was suspended by the Suspension and Fourth Section Board to and including December 15, 1976. The suspension board stated, as grounds for its action, that there was reason to believe that if the schedules were permitted to become effective, it would result in rates and charges, rules, regulations, or practices which would be beyond the scope of respondent's operating authority.

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[1] Rates are per barge load weighing approximately 2,000 net tons.

Respondents jointly submitted verified statements and argument in support of the proposal. No evidence in opposition was submitted.

In certificate No. W-457 (Sub-No. 6), MCBL is authorized, as here pertinent, to operate "[b]etween ports and points along the Atlantic coast and tributary waterways, from Massachusetts to Florida, inclusive ***." Respondents argue that the Gulf of Mexico is a tributary of the Atlantic coast, and it is their view that MCLB's authority embraces not only the east coast of Florida, but the west coast as well. Respondents cite *Coyle Lines, Inc., Extension—Flint River,* 308 I.C.C. 730, 733 (1959), for the proposition that "tributary waterways" is to be given a broad definition. Respondents also contend that the Commission's policy in interpreting operating authority, requiring a precise statement when less than a whole State is involved, is supportive of their interpretation of this authority, citing *Pilot Freight Carriers, Inc.,* v. *Malone Freight Lines,* 91 M.C.C. 58, 60 (1962), and that any doubt should be resolved in favor of the carrier, citing *Steiner Common Carrier Application,* 16 M.C.C. 305, 306 (1939). Because these rights were purchased, respondents insist that MCBL is entitled to rely upon the face of the certificate.

When Review Board No. 4 took this proceeding under consideration the schedules had expired by their own terms. It found that the investigation was, therefore, moot, and it ordered the proceeding discontinued.

In their petition for reconsideration, respondents argue that the review board should have decided the operating rights issue. They aver that the nature of the Atlantic coastwise regulated water industry is such that many, if not most, regulated movements are one-time shipments, and the tariffs frequently reflect that fact by expiration dates. They contend that the passing of the expiration date of the tariff does not render the case moot, citing *Apples from Pacific Coast to Illinois, Indiana, and South,* 213 I.C.C. 4, 6 (1935). Respondents state that in situations where a rate probably will be reestablished, the case will be continued, citing *Great Lakes Ship Owners Assn.* v. *Canadian Pac. Ry. Co.,* 299 I.C.C. 311, 312 (1956), and *Excursion Fares Between Chicago and Twin Cities,* 178 I.C.C. 742 (1931). Respondents argue that such a situation exists in this proceeding. It is their contention that under the review board's approach the issue of the scope of MCBL's authority might never be resolved. Moreover, they submit that under section 307(g) of the Interstate Commerce Act, together with the Administrative Procedure Act, they are entitled to an initial decision on the merits.[2]

DISCUSSION AND CONCLUSIONS

A preliminary determination to be made is whether the subject matter of this proceeding may properly be decided now, on the merits, or whether it has been rendered moot by the expiration of the suspended tariffs. We believe that the issue of whether respondent MCBL holds proper authority to perform the service envisioned under the suspended schedules should be decided notwithstanding the expiration of these schedules. Respondents have indicated that the traffic handled under the pertinent portion of the involved operating authority is of such a nature that tariffs covering such movements necessarily are of short duration. Thus it appears that similar tariffs, involving the same authority, will probably be reestablished in the near future. These circumstances clearly indicate that it is our duty to accept the issue tendered and to resolve it at this time. *Excursion Fares Between Chicago and Twin Cities, supra,* at 743-44; and *Great Lakes Ship Owners Assn.* v. *Canadian Pac. Ry. Co., supra.*

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[2] Respondents do not object to this proceeding being processed under the modified procedure. Because the evidence is in the form of affidavits, this division properly may decide the case on the merits without a prior such determination at a lower decisional level. In view of their right to petition under rule 101 of the Commission's General Rules of Practice (49 CFR 1100.101), respondents will in no way be prejudiced by this handling of the case.

It is respondent's view that they are entitled to rely on the face of the considered certificate in determining the scope of MCBL's operating rights. We agree. It is settled that in the absence of a patent ambiguity the Commission need not go behind a certificate to determine its meaning. *Houff Transfer, Inc.—Pur.—Boward Truck Line, Inc.*, 101 M.C.C. 727, 733 (1967), and cases cited thereat. Mere differences in opinion as to the meaning of a territorial description are insufficient to establish ambiguity. *Hilt Truck Line, Inc.—Investigation of Operations*, 117 M.C.C. 9, 17 (1972). Accordingly, the issue herein with respect to the scope of MCBL's authority may be decided without recourse to the underlying record of the proceeding wherein the subject operating authority was granted.

It has long been held that each certificate must be read as a whole, and that all provisions must be read to determine what authority a certificate grants. *A C. E. Transp. Co., Inc., Interpretation of Certificate*, 51 M.C.C. 155, 159 (1949); and *Shippers Truck Service, Inc.—19 States*, 125 M.C.C. 323, 328 (1976). Respondents, in their reading of the subject authority, have failed to follow these principles. As stated before, the considered certificate authorizes service "[b]etween ports and points along the Atlantic coast and tributary waterways, from Massachusetts to Florida inclusive ***." The clear import of the cited phraseology, taken as a whole, is to restrict operations to the Atlantic coast of the United States and tributary waterways along that coast. The Atlantic coast of the United States ends as the tip of Florida peninsula; there the coast of the Gulf of Mexico begins. The distinction between the Atlantic coast and the coast of the Gulf of Mexico has long been recognized by the Commission and maintained in the certificates and permits issued to water carriers. Respondents' contention that this certificate authorizes service at ports and points located on Florida's west coast is therefore untenable, and we conclude that this authority has been misconstrued by these carriers.

Respondents have failed to show that MCBL holds the requisite authority to perform its portion of the service required under the involved schedules. We conclude, therefore, that the considered tariff is unlawful, but because these schedules have expired by their own terms, no cancellation order is required.

FINDINGS AND ORDER

Upon reconsideration, we find that the proposed schedules were unlawful because if permitted to become effective, they would have resulted in charges, rules, regulations, or practices beyond the scope of respondent MCBL's operating authority.

We further find that this decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

COMMISSIONER HARDIN did not participate.

It is ordered, That this proceeding be, and it is hereby, discontinued.

RELEASED RATES ORDER NO. MC-894
(RELEASED RATES APPLICATION NO. MC-1379)

MACHINES, SYSTEMS OR DEVICES, DATA PROCESSING, OR UNITS THAT FORM COMPONENTS OF DATA PROCESSING MACHINES, SYSTEMS OR DEVICES, OR PARTS THEREOF, NOI, CLASSIFICATION RATINGS

Decided April 28, 1977

Application under sections 20(11) and 219 of the Interstate Commerce Act for authority to establish and maintain in the National Motor Freight Classification ratings dependent on declared values (released ratings) on data processing machines and equipment found to be just and reasonable. Application granted subject to expiration date and reporting requirement. Proceeding discontinued.

Bryce Rea, Jr., and *Patrick McEligot* for applicants.

Arthur A. Arsham for intervener in support of application.

John M. Cleary, James W. Devlin, Myron Smith, Richard T. Tobey, and *Charles A. Washer* for interveners not in opposition.

REPORT OF THE COMMISSION ON FURTHER HEARING

DIVISION 2, COMMISSIONERS HARDIN, MURPHY, AND CLAPP

HARDIN, *Commissioner:*

This is a somewhat unusual proceeding in that it began as a normal released-rates case and the consideration of a specific released-rates application but developed into a combination of a consideration of the merits of the instant application and the proposed review of the standards traditionally applied in determining the merits of released-rates applications. Generally, this proceeding involves a request by the Nation's general-commodity motor common carriers to publish released rates[1] on data processing machines and equipment, commodities of extremely high value. The motor carriers seek the released rates because they are concerned about the possibility of extraordinary loss and damage claims and the catastrophic effect it could have on them.

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[1] The general rule regarding liability for loss or damage is that the carrier shall be held liable for the "full actual loss, damage or injury" to property casued by it. Under section 20(11) of the Interstate Commerce Act, made applicable to motor carriers by section 219 of the act, the Commission, in its discretion, may permit the establishment of rates based upon the declared or released value of the property transported, which declared or released value then becomes the measure of the carrier's maximum liability. Twentieth-section relief may be granted when, in the (footnote continued on next page)

The National Motor Freight Traffic Association, Inc. (NMFTA), filed on April 29, 1975, a released-rates application calling for three levels of released ratings. The first has a released value not exceeding $5 per pound, the second has a released value exceeding $5 per pound but not exceeding $10 per pound, and the third has a released value exceeding $10 per pound but not exceeding $25 per pound. The greater the released values the higher are the ratings.[2]

NMFTA's application was supported by International Business Machines Corporation (IBM). We received no statements in opposition. By an order served June 13, 1975, the Commission's Released Rates Board denied the application. NMFTA and IBM filed petitions for reconsideration. In an order served October 1, 1975, the Commission, Appellate Division 2, denied the petitions for the following reasons:

> 1. It has not been shown that the lowest proposed released value represents a fair average value of the commoner forms of the machines and parts.
> 2. It has not been shown that the rating reduction offered to shippers in connection with the lowest released value is commensurate with the proposed reduction in carrier liability.
> 3. The elimination of full value ratings, subject to full carrier liability, has not been shown to be justified.
> 4. The number of claims filed in 1974 is not considered to have been frequent.
> 5. There has been no evidence presented to show that transit insurance is difficult to obtain or unreasonably expensive to maintain.

Following our order NMFTA instituted an action in the United States Court of Appeals for the District of Columbia for review of the Commission's determination.[3] Almost simultaneous with the filing of the appeal, NMFTA and IBM filed a petition with the Commission under rule 102 of the General Rules of Practice for

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(footnote 1 continued)
Commission's opinion, released rates would be just and reasonable under the circumstances and conditions surrounding the transportation. The Commission noted on occasion that the authority to approve partial limitations on carrier liability has been used sparingly, and properly so. See *Released Rate Rules—National M. Freight Classification*, 316 I.C.C. 499, 509 (1962); and *Rocky Mtn. Bur., Released Value Min. Charges*, 351 I.C.C. 505, 516 (1976).

[2] Attached as appendix A are the proposed provisions of the National Motor Freight Classification containing the above-described ratings. Also contained in appendix A are the existing classification provisions which are being sought to be amended or canceled.

[3] No. 75-2135, *National Motor Freight Traffic Association Inc. v. The United States of America and Interstate Commerce Commission*.

consideration by the entire Commission of the released-rates application.[4]

In an order and notice served February 19, 1976 (41 F.R. 8012), we vacated our order served October 1, 1975, and reopened the proceeding. This action was taken, however, subject to the approval of the court of appeals. Upon a joint motion of the parties, the court, in an order dated March 11, 1976, remanded the proceeding back to the Commission.

On April 26, 1976, we issued another order and notice (41 F.R. 18571). That order and notice basically is the same as our prior notice with certain alterations and additions. The following excerpt from the notice describes the proceeding as it is now before us.

> This proceeding appears to present certain unique problems not presented in the great majority of released rates cases. It is contended, for example, that this relief is necessary to permit competition for this traffic among modes and carriers. The Commission has attempted in this case to balance the interests of the involved carriers and shippers. While no objection to the application has been filed, the Commission may not ignore its duty to represent the public interest, and it has strived to do so in this proceeding. However, the Commission is convinced that comments from affected persons should be sought to determine whether the standards applied in the orders in this proceeding were proper and whether the denial of the petition was in the public interest. The Commission is especially interested in answers to the following questions.
>
> 1. Should the released value of the involved commodities have a greater relationship to the average value of the commodity than that proposed by petitioners?
>
> (Participants may also wish to discuss whether the commodity description is too broad. In line with question 3 concerning modification of established criteria and the foregoing suggestion, participants may wish to discuss whether the criteria concerning a wide range in values should be modified to a wide range in values or extraordinary values—which might not necessarily make the amount of the claim difficult to estimate, but which might make a claim catastrophically high. Thus, it might be discussed whether less valuable, more common or somewhat different types of articles might be separated from the commodity description, while still allowing applicants the possibility of relief.)
>
> 2. Should the tariff provide for full value ratings or excess value charges; is this necessary protection for small shippers or are all shippers willing and able to secure their own transit insurance at a reasonable cost; is cargo insurance available to carriers at a reasonable cost? (It should be noted that prior cases have focused on the carriers' ability to obtain cargo insurance.)
>
> 3. Petitioners aver that many carriers do not provide transportation service for these commodities due to the high loss and damage claims that could result. They cite a few examples of extraordinarily high claims to support this practice and the need for the released rates proposed. In the past, the Commission has required a greater degree of proof in this area. Specifically, the carriers have been required in most instances to show a relatively high susceptibility to loss and damage and a high ratio of claims to

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[4] Rule 102 allows for the filing of petitions seeking relief when the subject matter of the desired relief is not specifically covered by other rules.

> revenue. Should the Commission in this and similar instances modify these or other established criteria’

Pursuant to this notice, we have received statements from the NMFTA and IBM, as well as from a number of "less interested" parties.[5] These "less interested" parties all express the same view, i.e. (1) this proceeding should be limited to a consideration of the subject released-rates application only, (2) there is no need to reevaluate the established criteria used in released-rates cases and even if it were necessary it should be done in a separate and specific rulemaking proceeding, and (3) they are not opposed to the granting of the instant application. Notably, the Drug and Toilet Preparation Traffic Conference and the National Small Shipments Traffic Conference, speaking jointly, as well as the National Industrial Traffic League, not only do not oppose the application but actually take the position that it should be granted.

NMFTA and IBM provide the background for this proceeding and address themselves to the specific questions asked by the Commission.

Data processing machines and components are presently classified in the National Motor Freight Classification under items 115760 (Adding or Computing Machines, NOI), 115740 (Accounting Card Machines) and, in some cases, 133300 (Machinery or Machines, NOI). These provisions have been in the classification since its inception in 1935. Items 115760 and 115740 were established to cover mechanical or electromechanical devices which obviously are not as valuable as the electronic data processing equipment familiar to business and industry today.

Currently, both the household goods carriers[6] and the railroads carry data processing equipment under released rates. The liability of the household goods carriers is limited from $5 to $10 per pound. A rating wherein the carriers have full liability is available at a rate that is 1,000 percent higher than the base rate at the $5 released value. The railroads' limited liability is scaled from $1.50 to $5 per pound and there is no full-value option available. The released-rate structure of the household goods carriers has been in force for 11 years;[7] the railroads' has been in effect for 10 years.[8]

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[5] American Retail Federation, National Industrial Traffic League, jointly by the Drug and Toilet Preparation Traffic Conference and National Small Shipments Traffic Conference, Inc., Aerospace Industries Association of America, Inc., Warnaco Mens Sportswear, and jointly by Apparel Industries Inter-Association Committee, Clothing Manufacturers Association of USA, New Jersey Apparel Manufacturers Association and various other clothing industry associations.

[6] The household goods carriers are sometimes referred to as the "padded-van" carriers.

[7] Released Rates Order No. MC-484, issued 1966.

[8] Released Rates Order No. 1303, issued 1967.

It is the fundamental position of the NMFTA and IBM that the proposed released rates are necessary both to make it practical for motor carriers of general commodities to carry the equipment and to meet the competition of the household goods carriers and the railroads.

The first question posed by the Commission in the notice asks whether the proposed released values should have a greater relationship to the average value of the commodities involved. IBM has offered evidence showing that the various data processing systems and components or parts have a wide range of values. The systems range from $5.49 per pound to $156 per pound. The units that enter into the systems range in value from $5.32 to $603 per pound. And the components or parts have the widest range, $4.23 to $7,357 per pound. The average value of the systems has been calculated to be $70.72 per pound and the average value of the components or parts has been calculated to be $1,128.79. NMFTA submits that because these average values are so high, to establish higher released valuations "reasonably related" to these values would mean the carriers would have to establish extremely high classification ratings to reflect the greater risk assumed by them in transporting the higher valued articles. IBM contends that it would defeat the purpose of the proposed application to bring the released values into a closer relationship with the average value of the commodities. It cites the example of a truckload shipment of its products by household goods carriers (who have released rates) from Poughkeepsie, N.Y., to Columbus, Ga. The truckload weighed 48,941 pounds and had an actual value of $4,191,813. IBM states that if the released value were $40 per pound instead of $5, $10, $25 levels proposed herein, the carrier would have been exposed to a potential loss and damage claim of $2 million for a single truckload.

The first question has a second part which invites the parties to discuss whether the commodity description is too broad and whether the less valuable or more common types of articles might be separated. NMFTA and IBM believe that it would be difficult and impractical to make such a separation. The reasons being: (1) the commodities move in consolidated shipments consisting of various related articles which form single units, (2) high-value elements dominate these shipments, (3) separation would lead to problems with respect to interpreting and applying classification provisions and would vastly complicate the task of preparing bills of lading, (4) because of the overlapping values of these commodities it is doubtful that meaningful separation could be made which would narrow the overall range of values, and (5) most of the articles involved herein are tailored and assembled to meet the individual requirements of purchasers, thus there are few standard or common units.

In response to question 2 dealing with full-value ratings or excess value charges, protection of the small shippers, and transit and cargo insurance, NMFTA states that the problem in providing full-value ratings is even more acute than the problem presented in attempting to establish classification ratings which would reflect the average value of the data processing machines and their component parts. A provision embracing these commodities at their full value would require the carriers to assume a risk exceeding the gross revenue of many carriers and far in excess of the net operating profit of an even greater number of carriers for the loss or damage to a single shipment. According to NMFTA, 65 percent of the carriers participating in the classification have gross revenues of less than $500,000, and only 9 percent of the participating carriers have gross revenues of more than $5 million annually.

With respect to cargo insurance, NMFTA states that, while it is available to carriers, its cost is determined by past experience and a single catastrophic loss of a shipment of data processing equipment would result in an upward adjustment in the carrier's insurance premium. This additional cost would, in the main, be paid for by revenues produced from the handling of commodities other than data processing equipment, the vast majority of which do not exhibit the characteristic of extraordinary high value.

NMFTA also sees significant problems in employing excess value charges. Excess value charges provide the means for purchasing "spot" insurance to cover particular moves. Advance arrangements must be made for such insurance because it is the practice of insurers to conduct investigations prior to issuing it. NMFTA states these advance arrangements present an obstacle to the efficient operation of the shipper's distribution pattern. There is also a problem with the fact that "spot" insurance covers only the portion of the move handled by the purchasing carrier and thus interline carriers must purchase their own insurance.

On the other hand, NMFTA contends, shippers are well aware of the value of their data processing equipment and, without question, purchase insurance coverage to protect the articles during manufacture and assembly and during storage prior to shipment. In addition, these shippers use other modes already having released rates authority and have insurance to cover these moves. Thus, the shippers of the commodities involved in this proceeding are deeply involved in insuring their goods and this coverage can be extended to embrace moves by motor common carriers under released-rating provisions. The additional cost of the insurance would be paid for by the savings in transportation charges.

IBM argues that section 20(11) of the Interstate Commerce Act does not require that a full-value alternative be maintained. In numerous instances the Commission has granted released-rate authority without requiring alternation with full-value rates. Many of the commodities so authorized are analogous to data processing machines and components in that they are electronic products of high technology and have high values. Examples are radioactive materials,[9] electrical semiconductors,[10] and radio and television transmitters.[11] Also, of undoubted significance, IBM submits, is the fact that there is no provision for full-value ratings in the released-rate authority of the railroads for data processing machines and equipment.

IBM thinks that excess value charges are inappropriate for industrial products tendered in varying quantities by commercial shippers who have access to "spot" and term insurance. They appear more suitable for baggage, express, small package and parcel post traffic where they protect persons who generally do not have access to "spot" insurance.

With respect to transit insurance, IBM states that it maintains a policy insuring substantially all risks of physical loss or damage in inland transit. The amount of coverage and the premiums remain the same whether its products are shipped under released rates or not. In its agreement where it leases equipment, IBM relieves its customers of responsibility for loss or damage while the machines are in transit or in their possession.

In response to question 3 concerning the requirement that carriers requesting released-rate authority must show a high susceptibility to loss and damage and a high ratio of claims to revenue, NMFTA and IBM state that a statistically significant claims experience could not be developed for general-commodity motor carriers because, due to the absence of released rates and the risk that would be assumed by the carriers, they have moved very little of the data processing traffic. Neither NMFTA nor IBM support the alteration of these or the other criteria established in released rates cases. They simply believe the Commission should be flexible and deviate from our established guides in unusual situations such as where the transportation circumstances and conditions warrant it.

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[9] Released Rates Order No. MC-558.

[10] Released Rates Order No. MC-529.

[11] Released Rates Order No. MC-597.

DISCUSSION AND CONCLUSIONS

Although the Commission, in certain cases, has considered other criteria, in *Wearing Apparel, Accessories, Piece Goods—Shulman, Inc.*, 321 I.C.C. 1, 4-5 (1963), we summarized the following as the core criteria to be used in evaluating released-rates applications:

> (1) that the wide range in value of the commodity makes the amount of any claim that may arise difficult to estimate;
> (2) that the susceptibility of the traffic to loss or damage is comparatively high;
> (3) that a high ratio of claims to freight charges exists; and
> (4) that a great number and frequency of claims for loss and damage exists.

Other notable factors have been: (1) the difficulty of a carrier obtaining adequate insurance coverage; (2) the cost of insurance is unreasonably high; and (3) competitive necessity. See *Released Ratings and Rates on Engines*, 47 M.C.C. 767 (1968), and *Wearing Apparel, Accessories, Piece Goods—Shulman, Inc., supra.*

In our notice we invited comment on whether we should alter these criteria. It is the unanimous feeling of all the parties that we should not, in the context of this proceeding, tamper with or modify them. They urge us to judge the instant application on its own merit. We agree. It is apparent now that it would be inappropriate in this proceeding to change criteria employed in the variety of released-rates cases which involve many different conmodities with transportation circumstances and conditions far different from those attributable to data processing machines and equipment. There is also no need for proclaiming specific criteria for cases involving high-value commodities. Although standards have developed over the years in released-rates cases, our fundamental consideration in sections 20(11) and 219 of the act remains whether the transportation circumstances and conditions warrant the granting of a particular application. Each case should be viewed individually.[12]

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[12] In a notice dated September 19, 1975, our Released Rates Board announced that it was concerned about the number of released rates applications coming before it which fail to justify the relief sought based upon the established criteria. Currently the board is carrying on a review of both obsolete applications and application which no longer seem to meet the criteria. Although the criteria provide the preferable and, in most cases, the most appropriate framework for judging released rates applications, each application under review will be evaluated, as is done herein, based on its own particular transportation circumstances and conditions.

Turning to the merits of the instant application, adequate grounds exist to warrant its being granted. Applicant NMFTA only seeks released-rates authority comparable to that possessed by the railroads and household goods carriers, thereby permitting them to compete for the transportation of data processing machines and equipment. The application is not opposed by any party and indeed is supported by all those filing statements. IBM, the shipper most directly affected by it, vigorously supported the application when it was initially filed and has continued to do so at all of the various stages of this proceeding.

In our notice we voiced concern about the effect of the proposal on small shippers—will they be adequately protected without full-value ratings or excess value charges, are they able to secure their own transit insurance and, can they do so at a reasonable price. It appears that our concern was unwarranted because despite the extensive notice this proceeding received, no serious objection was registered. The significant representations were in support of it.[13]

We recognize that the application does not meet many of the traditional released rates criteria. The released values are substantially below the average values of data processing machines and equipment. There is no showing of a high susceptibility to loss or damage and a high ratio of the number of claims to the number of shipments, and the record does not indicate that the carriers have difficulty in obtaining adequate cargo insurance or have to pay an unreasonably high price for it.

NMFTA and IBM, however, have offered valid explanations for the absence of some of these. Released values near the average values of these commodities would result in very high ratings such as would defeat the purpose of the application and prevent the carriers from attracting the traffic. And because of the relatively small amount of traffic that is currently moving via general-commodity motor carriers a record of susceptibility to loss and damage and number of claims is obviously not available.

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[13] An article concerning this proceeding appeared in a publication known as the *Computer Law and Tax Report*. It suggested to its readers that they write to it or the Commission if they had any comments to make regarding the proceeding. Several letters, from what appear to be small computer compaines, were forwarded to us. One takes the position that the motor carriers should bear the cost of the insurance with the Commission setting rates accordingly. It submits that (1) it will give the carriers incentive to handle the shipments more carefully, and (2) there will be a pooling of the cost of damage claims by the insurance companies with the burden of a major accident being shared by all carriers; the ones with the poorer records will pay the higher rates. We think the proposed released values combined with the competition from the household goods carriers and railroads will give the motor carriers enough incentive to handle the shipments with care and provide good service. With respect to the pooling of damage claims by insurance companies, although it may be done, it is not a significant enough factor to affect our decision herein.

In addition to the lack of shipper opposition, IBM support, and the competitive need for this application, what is significant is that indeed what are involved are commodities of extremely high value whose claims for damage and loss could be extremely harmful to large carriers and catastrophic to small carriers.

Because our grant of this application is based on considerations which are not included in the traditional criteria employed in released-rates cases, we caution the carriers that they should not rely on this proceeding as precedent in attempting to justify future applications. Also, because we are not relying on the established standards or criteria, we think it appropriate to grant the authority herein conditioned upon a reporting requirement and an expiration date of 2 years from the service date of the report and order. This is particularly necessary because of the absence in the record of meaningful claims data.

ULTIMATE FINDINGS

We find that the released-rates relief proposed in the application subject to the reporting requirement and 2-year expiration date, has been shown to be just and reasonable under the circumstances and conditions surrounding the transportation.

We further find that this decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

An appropriate order is being entered.

APPENDIX A

Proposed released-rates ratings

Item number	Description	Classes		
		Less-than-truckload	Truckload	Minimum weight factor
	MACHINERY GROUP, subject to item 114000:			
	Business or Office, subject to item 115700:			
B (New)	Machines, Systems or Devices, data processing, or units that form components of Data Processing Machines, Systems or Devices, see Note, item C, in boxes or Packages 548, 786, 1120, or when weighing each not in excess of 1600 pounds, in wirebound crates; or Parts thereof NOI, in boxes:			
Sub 1	Released to a value not exceeding $5.00 per pound	92 1/2	55	24.2
Sub 2	Released to a value exceeding $5.00 per pound but not exceeding $10.00 per pound	150	92 1/2	20.2
Sub 3	Released to a value exceeding $10.00 per pound but not exceeding $25.00 per pound	250	125	20.2
C (New)	NOTE—The released or declared value of the property must be entered on the shipping order and bill of lading at time of shipment in the following form: "The agreed or declared value of the property is hereby stated by the shipper to be not exceeding $——— per pound."			

Presently effective tariff provisions proposed to be amended or canceled (reference is made to the new item)

Item number	Description	Classes		
		Less-than-truckload	Truckload	Minimum weight factor
	MACHINERY GROUP, subject to item 114000:			
	Business or Office, subject to item 115700:			
115740	Accounting Card Machines (Card Punching, Sorting or Tabulating) in boxes or Packages 548, 786, 1120 or when weighing each not in excess of 1600 pounds, in wirebound crates, or Parts, NOI, in boxes	100	70	24.2
115760	Adding or Computing Machines, or Parts, NOI, in boxes	100	70	24.2
	Change to read			
	MACHINERY GROUP, subject to item 114000:			
	Business or Office, subject to item 115700:			
115740	Accounting Card Machines, etc	Cancel. See item B		
115760	Adding or Computing Machines, NOI, see Note, item A, or Parts thereof, NOI, in boxes	100	70	24.2
A (New)	NOTE—Applies only on hand portable or desk top adding, calculating or computing machines.			

SECTION 5b APPLICATION NO. 7

RAILROADS PER DIEM, MILEAGE, DEMURRAGE AND STORAGE—AGREEMENT

Decided April 28, 1977

Agreement between and among rail carrier members of the Association of American Railroads relating to the organization and procedures for joint initiation, consideration or establishment, and adjustment from time to time of (a) the rates of compensation payable for the use of carrier furnished and shipper furnished freight cars, and other transportation equipment, (b) demurrage and storage charges payable by shippers for the use of freight cars and other transportation equipment and facilities, and (c) rules and regulations pertaining to such rates or charges, found not to be prohibited by paragraphs (4) or (5) of section 5b of the act and that approval would be in furtherance of the national transportation policy, when revised to conform with the conclusions reached. Order to be entered terminating the interim agreement approval by failure to notify the Commission, under verification, within 20 days of service date that a revised agreement in conformity with the conclusions reached herein shall be filed with the Commission within 60 days of service date.

Stephen Ailes, Harry J. Breithaupt, Jr., James I. Collier, Jr., and *Thomas C. Dorsey* for applicants.

John F. Donelan and *Frederic L. Wood* for the National Industrial Traffic League, in opposition.

Charles A. Tobin for the Federal Trade Commission, in opposition.

REPORT AND ORDER OF THE COMMISSION

DIVISION 2, COMMISSIONERS HARDIN, MURPHY, AND CLAPP

BY THE DIVISION:

The modified procedure was followed. Requested findings not specifically discussed in this report nor reflected in our findings or conclusions have been considered and found not justified or their resolution not necessary for appropriate disposition of this proceeding.

By application filed June 28, 1976, under section 5b of the Interstate Commerce Act, rail carrier members of the Association of American Railroads (AAR), hereinafter collectively called applicants, seek approval of an agreement between and among themselves, relating to organization and procedures for joint consideration, initiation, or establishment, and adjustment from time to time, of (a) the rates of compensation payable for the use of foreign line and other non-shipper-furnished freight cars, or other transportation equipment, (b) rates of compensation payable for freight cars or other transportation equipment furnished by shippers, (c) demurrage and storage charges payable by shippers for use of freight cars, or other transportation equipment and facilities, and (d) rules and regulations pertaining to such rates or charges. The subject matters covered by the agreement are intended for uniform application in connection with common carriers by railroad between all points in the United States.

Statements in opposition to the proposed agreement were filed by the National Industrial Traffic League (NITL) and the Federal Trade Commission (FTC) and applicants replied. Archer Daniels Midland Company, and the Department of Justice, Antitrust Division separately notified the Commission of their interest in the proceeding, but did not enter an appearance.

Public Law 94-210, the Railroad Revitalization and Regulatory Reform Act of 1976, enacted February 5, 1976, 90 Stat. 31, hereinafter called the 4-R Act, amended the Interstate Commerce Act (act) by, among other things, striking reference to "railroads" from paragraph (1)(A) of section 5a of the act, effective 270 days from the date of enactment, namely, November 1, 1976, and enacting a new section 5b of the act governing the standards for approval of collective ratemaking agreements between and among railroads subject to part I of the act. By order entered October 26, 1976, in Ex Parte No. 297 (Sub-No. 1), the Commission granted, effective November 1, 1976, interim approval of the agreement subject to specified terms and conditions, until such time as the agreement is processed by the Commission to final decision.

Section 5b of the act authorizes common carriers by railroad subject to part I of the act to apply to the Commission for approval of any agreement between or among two or more such carriers relating to rates, classifications, and other specified matters, or procedures for the joint consideration, initiation, or establishment thereof. The parties to an agreement approved by the Commission are relieved from the operation of the antitrust laws with respect to the making and carrying out of such agreement in conformity with its provisions and such terms and conditions as we may prescribe. The Commission is directed to approve such agreement if it finds the agreement to be in furtherance of the national transportation policy and not prohibited by the section 5b statute. Paragraphs (4) and (5) of section 5b prohibit the Commission from approving any agreement (1) with respect to a pooling, division, or other matter or transaction to which section 5 of the act is applicable, or (2) which does not accord to each carrier party the free and unrestrained right to take independent action without fear of any sanction or retaliatory action, at any time, before or after any determination arrived at through the procedure established by the agreement. In addition, limitations are provided that no conference, bureau, committee, or other organization established or continued pursuant to any agreement approved by the Commission under section 5b shall (i) permit participation in agreements with respect to, or any voting on, single-line rates, allowances, or charges established by any carrier; (ii) permit any carrier to participate in agreements with respect to, or to vote on, rates, allowances, or charges relating to any particular interline movement, unless such carrier can practicably participate in such movement, or (iii) permit, provide for, or establish any procedure for joint consideration or any joint action to protest or otherwise seek the suspension of any rate or classification filed by a carrier of the same mode pursuant to section 15(8)[1] of the act where such rate or classification is established by independent action. However, the limitations cited in (i), (ii), and (iii) above are not applicable to (1) general rate increases or decreases if the agreement accords the shipping public, under specified procedures, adequate notice of at least 15 days of such proposals, and opportunity to present comments thereon, in writing or otherwise, prior to tariff filing of such increases or decreases with the Commission, or (2) broad tariff changes of general or substantially general application throughout the territory within which such changes apply.

The instant agreement provides for the utilization by applicants of the services of the Operations and Maintenance Department of the AAR. Within the aforesaid department there is a standing committee, known as the General Committee—Operating-Transportation Division, which has authority to consider changes in current rates of compensation for the use of foreign-line and other non-shipper-furnished freight cars and other transportation equipment, or of any rules or regulations pertaining thereto, and a standing committee, known as the Committee on Compensation for Transportation Equipment Furnished by Shippers, Demurrage, and Storage, which has authority to consider changes in current rates of compensation for freight cars and other transportation equipment furnished by shippers, or demurrage or storage charges or allowances, or of any rule or regulation pertaining to such compensation, charges, or allowances. The General Committee consists of 17 members, one being selected by the American Short Line Railroad Association and 16 being territorially representative (1 each from New England and Canada, 3 from the South, 4 from the East, 2 from the Northwest, 3 from the Central West, and 2 from the Southwest). Each of the territorially representative members is elected for a term of 4 years by majority vote of the members of the AAR. The Committee on Compensation consists of a traffic officer appointed by the American Short Line Railroad Association, and the chief traffic officers of the 16 railroads that are represented on the General Committee.

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[1] The section 5b(5)(a)(iii) statute erroneously cites "section 15(7)" of the act. By virtue of section 202(e) of the 4-R Act, paragraph (7) of section 15 was amended so as to no longer apply to common carriers by railroad. In lieu thereof, a new paragraph (8) to section 15 was enacted to govern railroad ratemaking.

Any common carrier by railroad may at any time become a party to this agreement by subscribing to a counterpart thereof and delivering it to the Secretary, Operating-Transportation Division, of the AAR. Withdrawal from this agreement is permitted at any time by written notice to such secretary.

Article III of the proposed agreement provides that both the General Committee, and the Committee on Compensation shall consider proposals upon their own initiative, or upon recommendation of the board of directors of the AAR, or at the instance of a subscriber. Following such a consideration a majority vote of the members of the respective committees determines if a proposal shall be submitted to letter-ballot vote of the subscribers to the agreement. Any proposal so submitted shall contain the committee's recommendation and a supporting report. Article III further provides that any minority of the committee may submit to the subscribers a report of its views. The affirmative vote of subscribers owning a majority of the revenue freight cars owned by all subscribers constitutes approval of any change submitted to the subscribers for letter-ballot vote. In addition, the Committee on Compensation is directed to consider proposals relating to freight cars or other transportation equipment furnished by shippers, submitted by duly designated committees of interested shipper organizations or owners of the aforementioned transportation equipment. Such proposals shall be handled in accordance with the procedures set forth above. The Committee on Compensation is also directed to designate standing committees to meet with representatives of shipper organizations and owners of freight cars or other shipper-furnished transportation equipment concerning matters within the purview of this agreement, and to receive suggestions from individual shippers with respect to such matters.

In the event of failure or refusal of the General Committee or the Committee on Compensation to submit a subscriber initiated proposal for a letter-ballot vote of the subscribers, article V provides that any subscriber may, in writing, request such a vote and that this request will be honored by the appropriate committee.

The powers of the General Committee and the Committee on Compensation with respect to the consideration of matters within the purview of the agreement are set forth in article VII. It is provided therein that the General Committee or the Committee on Compensation may, upon the affirmative vote of three-fourths of its membership, give notice in writing to the subscribers that as of a day named, not less than 14 days subsequent to the date of notice, a change or changes in rules and regulations will be approved unless objections thereto be made in writing addressed to the Secretary of the Operating-Transportation Division of the AAR, prior to the day so named, by subscribers owning not less than 20 percent of the revenue freight cars owned by all subscribers. In the event of such objection the recommended change or changes will be submitted to the subscribers for letter-ballot vote, but if no objection is made the proposed changes will be published in accordance with the notice.

Article VIII concerns public hearings and notice to be given to interested parties regarding subject matters before the Committee on Compensation. It is provided therein that whenever the Committee on Compensation considers a change in rates of compensation for the use of freight cars or other transportation equipment furnished by shippers, or rules and regulations pertaining thereto, notice thereof shall be given by publication in a recognized traffic journal of national circulation to all owners of the freight cars or other transportation equipment furnished by shippers, used in interchange, and invite submission in writing from such owners within a stated period, not less than 15 days, of data or views deemed by them to be pertinent. The Committee shall consider data and views so furnished. Upon request of any owner, a public hearing will be held on not less than 10 days notice by publication in a recognized traffic journal of national circulation and reasonable opportunity afforded for expression of views. Article VIII further provides that whenever the Committee on Compensation considers a change in demurrage or storage rates and charges, or rules and regulations pertaining thereto, a public hearing will be held and interested persons will be afforded a reasonable opportunity to present views. Notice of such hearing will be given in a manner consistent with the aforementioned notice provisions of this article. Finally, article VIII prohibits the broadening of the territorial or commodity scope of any proposal without prior notice to the public published in the same manner as the original proposal.

Article IX of the agreement establishes the procedures to be followed by the Committee on Compensation in processing section 22 proposals pertaining to mileage allowances, demurrage or storage rates and charges, or rules and regulations pertaining thereto, applicable to Government traffic. It is provided therein that such proposals which may be submitted by a subscriber or a section 22 shipper, must be in writing to the committee. Notice thereof will be given to the subscribers and the interested shipper and no final disposition of the proposal will be made earlier than 14 days subsequent to the date of notice, except in the case of an emergency proposal. Within the aforementioned period an interested shipper may submit written representations concerning the proposal to the committee. The committee may in its discretion hold a conference with the interested shipper. Notice of final committee action regarding a section 22 proposal will be given only to the subscribers and the interested shipper.

The agreement provides that final disposition of any matter before the General Committee or the Committee on Compensation will be made within 120 days after docketing, and that all subscribers are accorded the free and unrestrained right to take independent action either before or after any determination arrived at through the agreement procedures. Joint action to protest or seek suspension of any rate or classification filed by one or more railroad carriers where such rate or classification is established by independent action is prohibited under this agreement.

In their supporting statement applicants aver that the agreement is not prohibited by paragraphs (4) or (5) of section 5b, and that it would be in furtherance of the national transportation policy. Applicants contend that the facts and circumstances which establish that the proposed agreement will be in furtherance of the national ansportation policy are the same as those set forth in the ommission's order approving a similar agreement among railroad bscribers under section 5a of the act in Section 5a Application ›. 7, *Association of American Railroads—Agreement*, 277 I.C.C. 3 (1950).

FTC opposes the agreement on the grounds that the record does ›t provide a sufficient basis for findings of fact as to whether ıtitrust immunity should be granted. It alleges that newly enacted ction 5b requires applicant railroads to submit evidence to clearly emonstrate that their activities are in furtherance of the national ansportation policy. In this regard, FTC submits a list of issues hich it believes must be addressed by applicants before the ommission can make such a finding in this proceeding. Moreover, TC contends that the policies enumerated in section 101(b) of the R Act should be considered part of the national transportation ›licy, and that any agreement approved pursuant to section 5b ıould be consistent with the policies expressed therein.

FTC further argues that, although the agreement guarantees the ght of independent action to the carrier parties, there is nothing in ıe record to establish, either from past practices or present rrangements, that independent action will in fact be protected. egarding the term "practicably participate," FTC contends that it ıould be more specifically defined in the agreement. According to TC, the definition must be phrased to limit its scope to include nly carriers which could actually participate in point-to-point ıovements.

Concerning discussion of single-line rates FTC urges that the 'ommission grant antitrust immunity only to a limited category of iscussions which are essential to the publication of joint rates. In ddition, FTC maintains that verbatim transcripts should be equired of all rate proceedings to insure that "discussion" of single-ine rates does not constitute "participation in an agreement" which iolates section 5b.

The proposed agreement is also opposed by NITL. NITL is oncerned that the agreement as proposed does not include the tatutory language of section 5b(5)(b) which excepts general ncreases and decreases and broad tariff changes from the agreement ınd voting prohibitions set forth in section 5b(5)(a). Absent such anguage NITL argues that carriers and shippers are prohibited by he antitrust laws from collectively considering general increases ınd decreases and broad tariff changes. NITL further urges that the ıgreement be amended to require that public notice of a recommended final disposition contain the reasons for the action taken as required by the Commission in Ex Parte No. 297, *Rate Bureau Investigation*, 349 I.C.C. 811 and 351 I.C.C. 437. In addition, NITL contends that 30 days' notice of proposed changes in the rate compensation for the use of shipper-owned transportation equipment is necessary in lieu of the proposed 15 days' notice provision. Finally, NITL argues that the agreement should be amended to explicitly authorize NITL to submit proposals to the Committee on Compensation, since such authorization was part of the prior approved agreement under section 5a.

Applicants do not specifically reply to the FTC's statement herein. They characterize the statement as a "conglomeration of unsupported allegations" which should be given little consideration. With respect to the contentions of NITL, applicants propose to amend their agreement to include the language of section 5b(5)(b) if such language is necessary to insure that applicants have antitrust immunity to collectively consider general increases and decreases and broad tariff changes. Applicants also propose to state the reasons for the action taken in all final disposition notices if the Commission deems such change is necessary. Applicants maintain in reply that failure to explicitly authorize NITL to submit proposals to the Committee on Compensation does not give NITL any less rights than it had under the previously approved agreement under section 5a since article III of the proposed agreement provides, in part, that the Committee on Compensation "shall consider proposals *** submitted by duly designated committees of interested shipper organizations." We agree with applicants that such language specifically authorizes shipper organizations, including NITL, to submit proposals. With respect to the 15 days' notice period for shipper comments on proposals, applicants contend that such a time frame is necessary to meet the 120-day limitation for final disposition of proposals pursuant to paragraph (11) of section 5b.

In conclusion, applicants reiterate the necessity for carriers to handle the matters covered by the subject agreement jointly, on a uniform national basis. They maintain that in the absence of an approved agreement, the possibilities of undue preferences and prejudices and unjust discrimination would be multiplied, and the ability of the railroads to meet their transportation responsibilities would be curtailed. Applicants allege that the proposed agreement is essential to the effectuation of and will be in furtherance of the national transportation policy.

DISCUSSION AND CONCLUSIONS

The enactment of section 5b of the act (section 208 of the 4-R Act) to supersede section 5a with respect to ratemaking agreements of rail common carriers, provides more restrictive statutory prohibitions governing the approval of such agreements by the Commission. Moreover, the regulations promulgated by the Commission under section 5a of the act in Ex Parte No. 297, *supra,* just prior to the enactment of section 5b, have equal application to the proposed section 5b agreement to the extent such regulations are not in variance with the section 5b statute.

Under paragraph (2) of section 5b, like the prior section 5a statute governing agreements among railroads, the Commission is invested with the duty and responsibility of effectuating the congressional mandate to approve ratemaking agreements between and among railroads if not prohibited by paragraphs (4) or (5) of that section, and if it finds that, by reason of furtherance of the national transportation policy, relief from the operation of the antitrust laws should apply with respect to the making and carrying out of the agreement; and that the Commission may prescribe terms and conditions necessary to enable it to grant its approval in accordance with such standard.

Prior to consideration of the proposed agreement, certain preliminary matters require disposition. FTC contends that section 101(b) of the 4-R Act should be considered part of the national transportation policy and that the agreement at issue must be consistent with each element enumerated therein. We do not agree with FTC. Section 101(b) expresses the intent of Congress in enacting the 4-R Act and summarizes the amendments to the Interstate Commerece Act affecting railroads. It contains no language, nor is there anything in the legislative history of the 4-R Act to support a conclusion that section 101(b) amends the national transportation policy. As pertinent herein section 101(b) provides that the 4-R Act is designed to "modernize and clarify the functions of railroad rate bureaus." We conclude, therefore, that the statutory standard to determine whether an agreement under section 5b of the act, is in furtherance of the national transportation policy remains the same as that which governed the Commission's determination under section 5a.

FTC also maintains that applicants must respond to the questions listed in the appendix to its statement to enable the Commission to find the proposed agreement in furtherance of the national transportation policy. Upon consideration of the issues presented by FTC, it is our conclusion that they are not germane to the instant proceeding, which relates to the formulation of procedures to establish uniform per diem charges, mileage allowances, and storage and demurrage charges for the purpose of promoting more efficient utilization of freight cars, and to avoid discrimination among various shippers with respect to such charges.

Initially, in determining whether the agreement may be approved, we must consider the specific prohibitions against approval contained in paragraphs (4) and (5) of section 5b. None of the parties contends that the agreement does not meet the requirements of paragraph (4) precluding an agreement with respect to pooling, division, or other matter or transaction to which section 5 of the act is applicable. As has been stated paragraph (5) requires that each carrier party be accorded the free and unrestrained right of independent action, and further provides additional prohibitions (not previously contained in section 5a) which preclude participation in agreements with respect to, or any voting on, single-line rates, allowances, or charges; or permit any carrier to participate in agreements, or to vote on, rates, allowances, or charges relating to any interline movement, unless such carrier can practicably participate in such movement; and prohibit any joint action to protest or otherwise seek suspension of an independent action established and filed by a carrier of the same mode. Paragraph (5) further provides that the foregoing prohibitions are not applicable to general increases or decreases provided at least 15 days' notice is given the shipping public and opportunity to present comments thereon prior to tariff filing with the Commission, or to broad tariff changes of general or substantially general application throughout the territory within which the changes are to be applicable. These matters are more specifically discussed hereinafter.

Article XIV of the proposed agreement accords each subscriber the free and unrestrained right to take independent action either before or after any determination arrived at through agreement procedures, and further, prohibits joint action to protest or otherwise seek suspension of any rate or charge established by independent action of a carrier of the same mode. In view of the foregoing explicit terms of the proposed agreement we are unable to subscribe to the view of FTC that there is nothing in the agreement to establish that the right of independent action will be protected.

Applicants have included the prohibitions of 5b(5)(a) in article I of the proposed agreement. Although they point out that proposals considered pursuant to their agreement are applicable nationwide, and, therefore, not within the purview of the aforesaid prohibitions, applicants acknowledge the possibility of joint action in the future concerning proposals which might fall within the prohibitions of section 5b(5)(a). FTC contends, however, that to comply with the aforesaid prohibitions the term "practicably participate" must be specifically defined within the context of this agreement. In view of the fact that the agreement does not relate to the establishment of interline charges, it is our opinion that such definition is not necessary herein.

As noted by NITL, the proposed agreement fails to specifically permit joint carrier action concerning general increases or decreases or broad tariff changes.

We agree with NITL that absent specific authorization within the agreement, there can be no joint carrier action with respect to proposals involving general increases or decreases or broad tariff changes. The agreement must detail, in definite and certain terms, the nature and scope of permissible carrier activity, and only those activities so described are authorized under the agreement. In this regard, applicants' proposed remedy of incorporating the provisions of section 5b(5)(b) by reference in article I is not sufficient. Applicants must specifically include the language of the aforesaid section within their agreement and clearly define the broad terms contained therein, such as "general increase or decrease" and "broad tariff change" before joint carrier activity with respect thereto can be conducted pursuant to the presently proposed agreement.

Another concern expressed by the FTC regarding applicants' compliance with the section 5b(5)(a) prohibitions relates to the right of discussion of single-line rates and charges under the proposed agreement. FTC maintains that it appears now to be unlimited. Review of the agreement, however, reveals that it contains no reference to discussion. In the absence of specific agreement provisions setting forth definite standards regarding member carrier discussions of single-line rates and charges, such activity is not authorized under the terms of the agreement.

Since the agreement does not authorize discussions among the carrier parties the issue raised by FTC concerning verbatim transcripts to monitor discussions of single-line rates has become moot and need not be considered further.

As mentioned previously, Commission approval of a proposed agreement under section 5b of the act, must consider apart from the specific prohibitions of section 5b(5)(a), whether the agreement is in furtherance of the national transportation policy. If a finding cannot be made that a proposed agreement is consistent with this policy and contributes to its effectuation then the agreement must be disapproved. Determination of the foregoing necessitates a broad examination of conditions which affect the public interest, the interests of the carriers, the needs of commerce, and the national defense. Those parts of the policy most directly pertinent here involve promotion of "adequate, economical and efficient service," for the fostering of "sound economic conditions in transportation," and for encouraging the establishment and maintenance of "reasonable charges for transportation services, without unjust discrimination, undue preference, or advantages, or unfair or destructive competitive practices."

Applicants herein allege that the necessity for handling the involved matters jointly on a nationwide basis, is unchanged from that found by the Commission in the prior section 5a proceeding. They maintain that in the absence of an approved agreement related to the matters at issue herein, the ability of the railroad industry to establish and maintain reasonable per diem, mileage, storage, and demurrage charges without unjust discrimination, and undue preferences and advantages would be seriously impaired.

In approving a similar agreement among applicant carriers under section 5a of the act the Commission concluded that it is necessary for the carriers to handle per diem, mileage, storage, and demurrage jointly on a uniform nationwide basis. The rationale was that such activities facilitate the performance of orderly transportation service by railroad in the public interest. The Commission cited *Rules for Car-Hire Settlement*, 160 I.C.C. 369, wherein it reviewed the uniform code of per diem rules, regulations and rate o compensation then in effect and generally observed by carrier throughout the United States. In that proceeding the Commissio required certain revisions in the uniform code but did no disapprove of its general plan. The Commission also quoted th following language contained in *Chrysler Corp.* v. *New Yor Central R. Co.*, 234 I.C.C. 755, 759, relating to the necessity for uniform code.

> Underlying the code were three motives: (1) To secure the greatest possible efficien in the use of cars in a time of acute car shortage, which had long persisted;

> avoidance of personal discriminations which a laxity in rules and their interpretation and the diversity of codes had permitted; and (3) to secure uniformity between sections, and between interstate and intrastate demurrage rules.

The necessity for uniform handling of the matters involved in the proposed agreement on a nationwide basis is firmly established in prior decisions of the Commission. The proposed agreement is designed to enable applicants to continue joint consideration of such matters previously considered pursuant to an approved section 5a agreement, under section 5b of the act.

In view of the foregoing, we conclude that collective consideration of the matters covered by the instant agreement, subject to the terms and conditions hereinafter prescribed, is necessary to the effectuation, and would be in furtherance of the national transportation policy and the public interest.

In addition to the deficiencies noted previously review of the proposed agreement indicates that further revisions are necessary before granting the relief provided in paragraph (8) of section 5b. The agreement, as proposed, is devoid of definite procedures for the processing of proposals. Moreover, there are no time limits applicable to committee processing of proposals. In the initial report in Ex Parte No. 297, at page 831 the Commission held that stated time periods must be established for each stage of the collective process and such time periods should be specifically stated in each agreement. Additionally, the notice provisions of the proposed agreement are inadequate, and there is no opportunity for input from subscribers prior to initial consideration by the General Committee. Provision should be made in the agreement that notice of all proposals will be given to all subscribers and interested persons within 5 days of receipt of the proposal by the committee. Moreover, the agreement should specify the publication to be utilized to notify the public of proposed changes and should detail specific time periods governing internal committee processing.

As noted previously, NITL objects to the 15 days' notice requirement in the agreement, relating to shipper participation before the Committee on Compensation. NITL contends that because of the complexity and nationwide scope of the rates and charges involved, 30 days' notice is required. In rebuttal, applicants maintain that the 15-day period is warranted because of the necessity under section 5b of the act to process all proposals to final disposition within 120 days. Since the involved agreement does not establish definite time frames for the internal processing of proposals we are unable to determine the necessity for a 15-day notice period as provided in the agreement. Accordingly, we conclude, that to permit interested shippers adequate opportunity for the submission of data or views concerning any proposal affecting the rates of compensation for the use of freight cars and other transportation equipment furnished by shippers, the proposed agreement should be amended to provide 30 days' notice.

The foregoing criticisms regarding the lack of definite procedures and time limits apply equally to article IX of the proposed agreement which concerns the processing of section 22 quotations by the Committee on Compensation. Additionally, it should be noted that article IX provides that no final disposition will be made of a section 22 proposal earlier than 14 days subsequent to the date of notice except in the case of an emergency proposal. What time limits will govern, and what constitutes an emergency is not defined. Applicants must amend their agreement accordingly before considering emergency section 22 quotations pursuant to their proposed agreement.

The agreement does not provide that public notice of final action will contain reasons for the action taken. See Ex Parte No. 297, 349 I.C.C. at page 821. Moreover, the agreement fails to comply with finding 4 of Ex Parte No. 297 which requires that formal minutes be maintained of all rate committee proceedings. The agreement procedures should be appropriately amended to reflect the foregoing standards.

We conclude that collective action relating to per diem, mileage allowances, storage and demurrage charges, applicable nationwide is necessary to enable the Nation's railroads to establish and maintain such charges on a reasonable basis without unjust discrimination, and undue preferences and advantages; that the collective action provided in the agreement before us, modified to the extent hereinbefore indicated, and properly safeguarded by actions of the parties and the Commission, is necessary to the continued and proper functioning of this Nation's essentially competitive transportation rate system; and that the national transportation policy will be furthered by our approval of this agreement when amended in accordance with our views.

FINDINGS

We find that the agreement described herein is within the scope of section 5b of the act and not one with respect to a pooling, division, or other matter or transaction to which section 5 of the act is applicable; that it accords to each party thereto the free and unrestrained right of independent action either before or after any determination arrived at through procedures established by the agreement; that the agreement does not permit any carrier to participate in agreements with respect to, or vote on single-line rates or charges; or permit, provide for, or establish any procedure for joint consideration or any joint action to protest or otherwise seek suspension of any rate or charge filed by a carrier of the same mode pursuant to section 15(8) of part I of the act where such rate or charge is established by independent action; and that approval of the agreement is not prohibited by paragraphs (4) and (5) of section 5b.

We further find that the agreement must be amended, as hereinbefore stated, before applicants can collectively consider per diem charges, mileage allowances, and storage and demurrage charges of nationwide application.

We further find that an agreement so amended and subject to the conditions set forth in this report, is necessary to the effectuation, and will be in furtherance of the national transportation policy.

We further find that, by reason of futherance of the national transportation policy declared in the Interstate Commerce Act, the relief provided in paragraph (8) of section 5b should apply with respect to the making and carrying out of the agreement, subject to the terms and conditions hereinbefore stated.

We further find that the advantages accruing to the public interest from the making and carrying out of the agreement, as modified by the terms and conditions prescribed herein, outweigh any possible disadvantages which could arise therefrom.

We further find that approval of the agreement cannot be granted by reason of the deficiencies hereinbefore stated in the report and, therefore, the agreement must be disapproved; that disapproval requires termination of the interim approval granted the agreement by order of the Commission entered October 26, 1976, in Ex Parte No. 297 (Sub-No. 1), except that paragraph (6) of section 5b of the act authorizes the Commission to postpone the effective date of any order terminating or modifying approval for such period determined reasonably necessary to avoid undue hardship, and, therefore, a terminating order will be withheld for a specified period of time to afford the applicants an opportunity to present a revised agreement in harmony with the conclusions reached in the report.

Wherefore, and good cause appearing:

It is ordered, That the interim approval of the agreement described herein granted by order entered October 26, 1976, in Ex Parte No. 297 (Sub-No. 1), be, and it is hereby, terminated 30 days from the date of service of this report and order, unless within 20 days of said date of service, applicants notify the Commission, under verified statement of their attorney-in-fact, that they will file a revised agreement in conformity with the conclusions and terms and conditions for approval reached in this report and order within 60 days of the date of service of this report and order. If the verified statement or the revised agreement is not filed within the prescribed periods, an order will be entered dismissing the application and terminating the interim approval of the agreement in force and effect.

EX PARTE NO. MC-97

INVESTIGATION INTO PRACTICES OF MOTOR COMMON CARRIERS OF PROPERTY ON RESIDENTIAL AND REDELIVERED SHIPMENTS

Decided May 9, 1977

Extra charges assessed by motor common carriers of property on service to or from certain types of premises, including private residences, found to be contrary to the provisions of the Interstate Commerce Act. Regulations for the assessment of redelivery charges prescribed.

C. J. Boddington, Homer S. Carpenter, Louis J. Carque, Joseph E. Cassidy, J. Raymond Clark, Don R. Devine, Joseph E. Donovan, Gerald S. Duzinski, E. J. Dwyer, John S. Fessenden, Ralph K. Fillingame, Jesse P. Finlaw, Michael Gallagher, William Hassett, Thomas M. Hummer, S. Harrison Kahn, Edward W. Kelliher, William E. Kenworthy, Cliff Knowles, Fred W. Lidle, Lawrence E. Lindeman, Richard G. Lougee, Timonthy Mashburn, George D. Michalson, Norman R. Powell, Bryce Rea, Jr., Phillip Robinson, J. Alan Royal, William G. San Antonio, Jr., Sherman D. Schwartzberg, Irving R. Segal, H. Smith, Jr., Sam E. Somers, Jr., Mert Starnes, J. Anthony Terilla, Delwyn J. Van Dyke, J. P. Wolonsky, Francis L. Wyche, and *George Zigich* for motor common carrier respondents.

Armand B. Ball, Jr., Jules F. Bernard, Raynard F. Bohman, Jr., Linda E. Buck, John M. Cleary, J. Aiden Connors, John F. Donelan, James P. Ehret, Fredric J. Einhorn, Robert Fischer, J. A. Illes, Calhoun E. Jacobson, Larry Joseph, Steven J. Kalish, Gordon P. Leibfried, Theodore Polydoroff, R. Ronshausen, Myron Smith, Alan J. Stolz, Daniel J. Sweeney, David C. Todd, and *Charles A. Washer* for shippers and other interested parties.

Bernard A. Gould and *Oliver H. Miles* for the Bureau of Investigations and Enforcement, Interstate Commerce Commission.

Robert P. Kane and *Gordon P. MacDougall* for the Commonwealth of Pennsylvania.

Virginia H. Knauer for the Office of Consumer Affairs.

REPORT OF THE COMMISSION

BY THE COMMISSION:

The Commission began this proceeding by Notice of Proposed Rulemaking and Order of September 4, 1975, served September 11, 1975 (40 F.R. 43038). At issue is the legality of various charges assessed by motor common carriers in addition to their line-haul rates on shipments to and from private residences, camps, apartment houses, churches, country clubs, and farms and the legality of redelivery charges to the same kinds of locations where no notice is given to the receiver of an impending delivery.[1] As a possible solution for public complaints received, the Commission proposed for inclusion at 49 CFR 1307.35 the following:

> (e) Assessment of charges on shipments originating at or destined to private residences and other types of premises.
>
> 1. Tariffs of for-hire motor common carriers shall not provide for the application of rates or the imposition of charges, by whatever means, for movements to or from, for example, private residences, apartments, churches, schools, camps, and other such locations, which differ from otherwise applicable rates from or to other locations such as businesses, warehouses, and other generally recognized commercial locations.
>
> 2. Before attempting delivery to residences and other related types of premises such as those described in 1, the carrier must reach agreement with the consignee or consignor regarding the date and time (approximate) of such delivery. This arrangment for delivery may be accomplished through a notation by the consignor on the bill of lading, or by oral or written arrangement between the carrier and the consignee. In any case, some mutually agreed-upon arrangement for delivery must be made before tender of delivery is initially attempted.
>
> 3. If the carrier complies with the regulation described in 2, and, through the fault of the consignee, is unable to tender delivery as scheduled, a reasonable charge to cover the service described in 2 and additional costs of the renotification, arrangement, and redelivery may be assessed. The requirements of 2 regarding prior arrangement for tender of delivery are similarly applicable when redelivery is necessary.

POSTURE OF THE PROCEEDING

All motor common carriers of property operating in interstate or foreign commerce within the United States and subject to the Interstate Commerce Act were made respondents and the Commission's Bureau of Investigations and Enforcement was authorized and directed to participate in this proceeding.[2] All interested persons were permitted to participate by submitting for consideration their written statements of facts, views, and arguments on the adoption of the proposed regulations or on any other subjects pertaining to this proceeding. The response consisted of 45 statements of facts, arguments, and views filed by the major motor carrier rate bureaus;[3] Eastern Central Motor Carriers Association, Inc., Motor Carriers Traffic Association, Inc., Local and Short Haul Carriers National Conference, many individual motor common carriers, the National Industrial Traffic League, the National Small Shipment Traffic Conference, and Drug and Toilet Preparation Traffic Conference, American Retail Federation, Mail Order Association of America, American Camping Assn., Inc., American Assn. of Nurserymen,[4] several businesses, the Office of Consumer Affairs, Traffic Managers Conference of California, the Commission's Bureau of Investigations and Enforcement and others. Eleven reply statements were received.

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[1] Redelivery charges apply to all receivers without distinction. However, they are a particular source of complaint to noncommercial receivers who do not ususally maintain office hours so that lacking notice they are often not available to accept the shipment making redelivery necessary.

[2] The motor carriers claimed that the term "respondents" caused them confusion so the Commission thereafter referred to all participants as "parties."

By order served April 5, 1976, the Commission denied a petition by the major motor carrier bureaus to discontinue the proceeding in lieu of a proposal to change the present treatment of residential shipments so that the carriers would (1) set such shipments aside until they arranged a convenient delivery date with the consignee, and (2) told the residential consignee of the private residence charge and gave him or her the option of avoiding it by picking up the shipment at the carrier's terminal. In denying the motion for discontinuance, the Commission stated that the carrier's proposal failed to address a central issue in this proceeding, namely, whether an additional charge for private residence pickup and delivery is justified. By notice served April 6, 1976, the Commission stated that oral hearing would be scheduled and that at the hearing it would entertain bona fide petitions for leave to intervene because of the importance of the proceeding to the Nation's consumers.[5]

A prehearing conference was held June 9, 1976, in Washington, D.C., at which no one requested oral hearing. Some of those present requested an opportunity to file briefs and permission was granted. Briefs were received on September 1, 1976, from the American

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[3] Central and Southern Motor Freight Tariff Association, Central States Motor Freight Bureau, Middle Atlantic Conference, Middlewest Motor Freight Bureau, New England Motor Rate Bureau, Pacific Inland Tariff Bureau, Rocky Mountain Motor Tariff Bureau, and Southern Motor Carriers Rate Conference.

[4] Joined by 10 other associations.

[5] The petitions to intervene by Ad Seidel & Son, Inc., C. F. Emling Company, and Select Service and Supply Co., Inc., are granted and the material submitted is received in evidence.

Camping Association, American Retail Federation, Eastern Central Motor Carriers Assn., Inc., the Commission's Bureau of Investigations and Enforcement, Commonwealth of Pennsylvania, Mail Order Assn. of America, Motor Carriers Traffic Association, Inc., motor common carriers tariff bureaus,[6] National Small Shipment Traffic Conference, Inc., and Drug and Toilet Preparation Traffic Conference, Outboard Marine Corp., Southern Motor Carriers Rate Conference, Inc. Traffic Managers of California, and United Parcel Service, Inc. (New York and Ohio).[7]

We have considered all of the facts, arguments, views, and replies filed by the parties and will mention them as pertinent to our treatment of the issues presented. Each submission is summarized in appendix A.

BACKGROUND

Pickup and delivery charges at nonbusiness locations began to appear in carrier tariffs in the early 1960's. Since that time they have spread in scope so that today most motor carriers have some kind of charge for this service. The result can be startling. For example, most regular-route, general-commodity carriers who participate in Middlewest Motor Freight Bureau tariffs will transport a 50-pound package of soap powder, from a commercial location in Denver, Colo., to a commercial location in Kansas City, Mo., for a minimum charge of $18.50.[8] This charge includes the line-haul service plus pickup at Denver and delivery at Kansas City. If that package is shipped from a commercial location in Denver to a private residence in Kansas City, the minimum charge is still $18.50. That charge now, however, includes only the line-haul service and the pickup at Denver. An additional $8.95[9] must be paid for delivery in Kansas City. If the same package is shipped from a private residence in Denver to a private residence in Kansas City, the charge is still $18.50, but now the service rendered for this charge only includes the line-haul transportation. The private residence shipper and receiver must pay an additional charge of $8.95 at each end of the line-haul movement. These charges apply regardless of pickup and delivery conditions and regardless of degree of difficulty or time involved in performing pickup and delivery. Shown graphically the difference in charges because of the kind of premises from which the shipment originates and/or terminates is as follows:

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[6] Those mentioned in footnote 3 except the Southern Motor Carriers Rate Conference, Inc.

[7] Central Freight Lines, Inc., et al., resubmitted copies of their initial statement and requested that it be considered as their brief. The request is denied as this practice violates the spirit of the Commission's Rules of Practice. The parties are to be helpful to the Commission in its deliberations and not simply increase the amount of paper received.

[8] Middlewest Motor Freight Bureau class tariff, MWB 502-B, I.C.C. MWB 502-B, effective October 21, 1976.

[9] Many parties complain that residential charges are often as high as 50 percent of the line-haul rate. However, we are not considering in this proceeding the lawfulness of the rate levels but whether the charges are per se lawful.

Denver origin	to	Kansas City destination	Pickup	Line-haul	Delivery	Total charge
Commercial		Commerical		$18.50		$18.50
Commercial		Private		18.50	$8.95	27.45
Private		Private	$8.95	18.50	8.95	36.40

There are other accessorial charges which can and often are added to the private residence pickup and delivery charge. These apply to all shippers and receivers regardless of location. Individuals who receive packages at their homes do not use motor common carriers often, so they do not know how to avoid extra charges and, in most instances, are caught by surprise when told they are due.

One such accessorial charge is for notification prior to delivery. Simply put, most carriers assess a specific charge if they are requested by a shipper, most often by notation on the bill of lading, to call the receiver before attempting delivery. A specific example is found in item 647 of Middle Atlantic Conference Tariff 192-A, MF-I.C.C. A-2804, which with numerous exceptions provides for a flat charge of $4.39 on less-than-truckload (LTL) traffic. These charges are involved in the second paragraph of the proposed rule, (e)2 and will be treated in detail in our seriatim discussion of the proposed rules which follows.

Another accessorial charge is for redelivery. This applies where the carrier's attempt to deliver the shipment failed through no fault of its own and it must take the shipment back to the named destination a second time. Redelivery applies whether or not the receiver was told by the carrier to expect delivery and it can be assessed more than once on the same shipment. A specific example of a redelivery charge is found in item 830 of Middle Atlantic Conference Tariff 192-A, MF-I.C.C. A-2804, which provides for the assessment of the local rates from the terminal to the destination point or if the consignee elects to pick it up at the terminal a charge of 77 cents per hundredweight with a minimum charge of $4.67 and a maximum of $92.75. Redelivery charges on residential shipments are covered in the third paragraph of the proposed rule, (e)3, and will be discussed later in this report.

Other extra charges which can be assessed on residential shipments include charges for storage, detention, single shipments, area arbitraries, inside deliveries, and extra labor. Storage charges apply where a carrier, through no fault of its own, cannot deliver a shipment in the normal course of business and must retain custody for longer than usual. These charges normally begin to run 24 hours after a shipment arrives at the terminal which will accomplish delivery. An example of a storage charge is in item 910 of Middle Atlantic Conference Tariff 192-A, MF-I.C.C. A-2804, which provides for a charge of 31 cents per hundredweight with a minimum of $1.66 per shipment for each 24-hour period but not less than $7.88 per shipment with a maximum of $23.61 for the first 24 hours, $31.49 for the second, and $47.25 for the third 24-hour period. Similar items can be found in most of the major bureau tariffs.

Single-shipment charges, similar to minimum charges, apply where a shipment tendered at one time and at one place is less than a certain weight. An example of a single-shipment charge is item 885-D of supplement 17 to Middle Atlantic Conference Tariff 500-A, MC-ICC A-2662.

Area arbitraries apply to shipments within a geographic area on the theory that the costs of motor carrier operations in the area are higher than the normal costs of operations, so that the carrier needs additional revenue to make handling the traffic compensatory. Technically, an arbitrary is the fixed amount which must be added to the rate from or to the base point to arrive at the applicable charge.

Unloading is accomplished when the shipment is moved beyond the tailgate of the vehicle. If a receiver requests that a shipment be placed at some point inside the house, there is a possibility that charges will be assessed for handling freight not adjacent to vehicle and/or inside pickup or delivery. Examples of charges for inside deliveries, single shipments, extra labor, and area arbitraries are shown in appendix B hereto.

Detention applies where a shipper or receiver holds a vehicle beyond the free time allowed by the carrier to accomplish pickup and delivery. Detention charges of motor carriers are the subject of a pending proceeding, Ex Parte No. MC-88, *Detention of Motor Vehicles—Nationwide*, 124 M.C.C. 680, and the subject will not be covered here.

FACTS

It appears on this record, reply statement of the motor common carrier tariff bureaus,[10] that traffic originating at or destined to homes or the other places which are assessed added charges by most motor common carrier tariffs amounts to between 1 and 3 percent of all the traffic handled by motor common carriers of property. This figure is confirmed by the statements of some individual carriers. For example, in 1974, Alleghany Corp. doing business as Jones Motor, a general-commodity carrier operating in 21 States in the East and as far west as Iowa and Missouri, had 21,000 shipments out of 1,094,289 to or from private residences, so that the traffic in question amounted to 1.9 percent of the total handled by this carrier. Lo Biondo Bros. Motor Express of Bridgeton, N.J., a general-commodity carrier, handles about 10 shipments, less than 1 percent of its total, to private residences per week. Roadway Express, Inc., of Akron, Ohio, a general-commodity carrier operating in official, New England, southern, central, middlewest, and southwest territories, states that 99 percent of its business is with commercial customers. Law Motor Freight, Inc., of Nashua, N.H., is a general-commodity carrier with authority in New Hampshire, Massachusetts, and Rhode Island. In 1974, deliveries to private residences accounted for 1.47 percent of all shipments handled.

Some carriers handle a great deal more of this type traffic. These carriers are United Parcel Service (UPS) and household goods carriers. According to UPS, a substantial percentage of the 3.5 million packages it handles daily are delivered to private residences, apartments, churches, schools, camps, and other related types of premises. UPS does not assess extra charges for residential deliveries. It makes three delivery attempts without extra charge and leaves a printed notice informing the receiver whom to contact for information on delivery. These practices appear to work satisfactorily for its customers as we have received no complaints from them.

Almost all household goods shipments move from residence to residence. This is contrary to the major flow of residential traffic which moves from a commercial origin to a residential location.[11]

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[10] Those mentioned in footnote 3.

[11] The statement by Jones Motor that 1.9 percent of its traffic involved residential pickup or deliveries and less than 5 percent of this traffic originated at a private residence, is consistent with the testimony of all carrier witnesses.

Household goods carriers do not assess extra charges for residential pickup and delivery and the communications between them and their customers as to when delivery will take place are covered by rules adopted in prior proceedings.

It is difficult to determine from the statements of the short-haul carriers whether residential shipments occur more frequently to them. For example, Treadway's Express, Inc., which operates in New York and New Jersey, states that its traffic consists of 15-20 percent of residential and camp deliveries in summer and 10-15 percent in winter. Smith Bros. Express, Inc., operates on Staten Island, N.Y., and residential shipments make up 25 percent of its traffic. A contrary view is offered by Rooks Transfer Lines, Inc., of Holland, Mich., a general-commodity, short-haul carrier serving 800 points in Indiana, Illinois, and Michigan, which states that shipments from or to a private residence constitute a minute portion of its total shipments handled.

Similarly, the record is unclear as to how much of this residential traffic is handled by carriers who specialize in moving new furniture. Sternberger Motor Corporation is such a carrier. It characterizes its traffic as that requiring commercial deliveries and that requiring inside deliveries. The latter gets an accessorial charge and includes unwrapping, uncrating, and setting up items and occurs on some 70 percent of the traffic handled. Byrd Motor Line, Inc., is known primarily as a new-furniture carrier and it handled 468 residential deliveries or 2.1 percent of the total 21,523 shipments moved during the first 6 months of 1975. Colonial Motor Freight Line, Inc., is authorized to transport general commodities, but 40 percent of its gross revenue comes from movements of new furniture. The latter accounts for the preponderance of its residential shipments.

As regards carrier revenue, the amounts derived from this traffic when compared with total revenue of general-commodity motor common carriers is not considerable. Alleghany Corp. doing business as Jones Motor estimates it to be 0.13 percent of its total revenue, while the witness for Law Motor Freight puts it at less than 1 percent of that carrier's gross revenues. Interstate Motor Freight System of Grand Rapids, Mich., projects its 1974 revenue from performing pickup and delivery service at private residences to be approximately $150,000 or 0.104 percent of its total gross revenues of $144 million.

Another fact which appears from this record is that significant amounts of residential deliveries are repeats. In other words, many people use motor common carriers regularly to receive shipments at their home from which they conduct a business. Drivers from Illinois-California Express, Inc., Northwest Transport Service, Inc., and Navajo Freight Lines, Inc., stated that based on their experience about one-half the number of shipments go to people conducting businesses from their homes. A driver for Ringsby-United refers to the one residential consignee who receives 200 to 400 cartons of merchandise every other week. Confirmation of this fact is contained in the statement of the Fuller Brush Company that it ships over 200,000 shipments per year to the homes of its 10,000 dealers.[12] Also, the Church of Jesus Christ of Latter-day Saints sent 149,613 shipments in 1974 to the homes of its 5,000 officers. American Home Products Corporation, a producer of consumer-packaged products, ships salesmen's samples and merchandise from its 54 plants and 145 warehouses directly to the residences of its salesmen/dealers. A. H. Robins Company uses motor carriers to make approximately 2,500 deliveries each year to its salesmen, and Eli Lilly and Company makes more than 17,000 shipments each year to its sales personnel, almost all of whom operate out of their homes.

DISCUSSION OF THE PROPOSED RULES

1. The first paragraph of the proposed rule would eliminate extra charges by motor common carriers for movements to or from private residences, apartments, churches, schools, camps, and other such locations which differ from the charges to or from commerical locations.

Because many people concerned with the result of this proceeding are unfamiliar with Commission procedures, it is perhaps well to explain that the Commission receives a tremendous number of tariffs for filing daily. By the terms of the Commission's General Rules of Practice, rate proposals are subject to public protest within a period of 12 days before they become effective. If they are protested, an employee board reviews them, and then decides whether the tariffs should be investigated and/or suspended. Appeals from the board's decision are acted upon by Appellate Division 2. The Commission has the power to investigate and/or suspend rate proposals on its own motion but the large number of tariff filings, nearly 400,000 a year, and the Commission's limited personnel makes this very difficult.[13]

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[12] Because of cost and service considerations it is using package delivery carriers for most of its traffic.

The notice instituting this proceeding left no doubt that the central question at issue here is whether these charges are lawful. Traditionally, basic motor carrier rates have reflected the cost of pickup at origin, platform handling, line-haul movement, billing and collecting, various overhead expense and one delivery at destination. Accessorial charges are those services not included in the line-haul rate. In addition to residential pickup and delivery, several accessorials which could apply on residential shipments were discussed earlier.

At almost every point in this proceeding we indicated that we wanted competent cost data as to the services involved but—none was presented. The parties chose to rely on other grounds. Motor carrier representatives presented some material which they euphemistically term cost "studies." These are detailed in appendix C.

Representatives of the motor carriers advanced two lines of argument. First, they contend that they are not required to cost justify presently effective provisions in a rulemaking proceeding and that the lawfulness of the present charges is not at issue here since this is not a complaint proceeding or a Commission investigation. Secondly, they believe they have presented the best cost evidence they could in the time frame presented, that the Commission has the ability to get the best cost evidence itself, and that it is clear from the general descriptions by carrier operating personnel that it is more time consuming and, therefore, expensive to service private residences and the like. The carriers contend that general rate levels are predicated on the average transportation characteristics of moving freight for commercial accounts and they need to be compensated separately for the added expenses encountered in performing pickup and delivery at private residences.

Those favoring adoption of the rules claimed that the carriers' failure to make a detailed cost presentation is a fatal omission, citing Wigmore for the proposition that the burden of proof for going forward normally falls on the party having knowledge of the facts involved and here the pertinent facts are costs which are within the domain of the carriers.[14] The proponents contend that these charges violate section 216(b) of the act (49 U.S.C. 316) in that they apply to a particular class based on an arbitrary classification and without regard to the service furnished. They argue that carriers are refusing to serve members of the general public on an equal basis with commercial accounts, contrary to the service which common carriers must hold out to the general public. They also cite section 216(d) (49 U.S.C. 316) and argue that these charges are unjust and unreasonable, preferential and prejudicial, and discriminatory.

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[13] For a more detailed discussion of this process see *Aberdeen & Rockfish Railroad Co., et al.* v. *Students Challenging Regulatory Agency Procedures*, 409 U.S. 1207 (1972).

[14] 9 Wigmore, *Evidence* § 2346 at 275 (3d ed. 1940).

The first question to be answered is the carriers' argument on the burden of proof and their contention that the Commission can only consider the lawfulness of industrywide practices which are contained in tariffs in an investigation or complaint proceeding.

The "Attorney General's Manual on the Administrative Procedure Act" (1947), at pages 13 and 14, treats the distinction between rulemaking and adjudication in some detail, as follows:

> Since the definition of adjudication is largely a residual one, i.e. "other than rulemaking but including licensing", it is logical to determine first the scope of rulemaking. The definition of rule is not limited to substantive rules, but embraces interpretive, organizational and procedural rules as well. Of particular importance is the fact that "rule" includes agency statements not only of general applicability but also those of particular applicability applying either to a class or to a single person. In either case, they must be of future effect, implementing or prescribing future law.
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> * * * * * * *
>
> *** Rulemaking is agency action which regulates the future conduct of either groups of persons or a single person; it is essentially legislative in nature, not only because it operates in the future but also because it is primarily concerned with policy considerations. The object of the rulemaking proceeding is the implementation or prescription of law or policy for the future, rather than the evaluation of a respondent's past conduct. Typically, the issues relate not to the evidentiary facts, as to which the veracity and demeanor of witnesses would often be important, but rather to the policy-making conclusions to be drawn from the facts. Senate Hearings (1941) pp. 657, 1298, 1451. Conversely, adjudication is concerned with the determination of past and present rights and liabilities. Normally, there is involved a decision as to whether past conduct was unlawful, so that the proceeding is characterized by an accusatory flavor and may result in disciplinary action.

What we are doing here is making an "agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy" formulated under the general provisions of part II of the Interstate Commerce Act. This is clearly within the definition of rulemaking of section 2(e) of the

Administrative Procedure Act.[15] We have no doubt that we have chosen the proper vehicle to examine the lawfulness of what appears to be a general motor carrier practice of charging more for services to and from certain premises.

The Commission's responsibilities in respect to motor common carrier regulation are set out in part II of the act. Section 204(a)(1) makes it the duty of this Commission "to regulate common carriers by motor vehicle" and to that end we may establish reasonable requirements with respect to continuous and adequate service. Section 204(a)(6) requires us "to administer, execute, and enforce all provisions" of part II and "to make all necessary orders in connection therewith, and to prescribe rules, regulations, and procedures for such administration." Section 204(b) allows us to classify or group common carriers by motor vehicle and to establish just and reasonable rules, regulations, and requirements to be observed by the carriers so classified as we deem necessary in the public interest. Section 208(a) concerns the service authorized in certificates of public convenience and necessity. We believe these sections enable us to scrutinize carrier practices and to judge their reasonableness. We disagree with the motor carrier interests that because the practices in question are in tariffs they are inviolate. This Commission has the ability, at any time to review those carrier practices which it believes deserve scrutiny.

In Ex Parte No. MC-68, *Removal of Truckload Lot Restrictions*, 106 M.C.C. 455, 480 (1968), another rulemaking proceeding instituted on our own motion, we found that the truckload lot restrictions which had been in motor common carrier certificates for some time precluded carriers from providing a service which would have been required by the common law and ordered the restrictions removed. We commented there that:

> *** we feel strongly that we are enjoined, by the trust which Congress has placed in us, to review constantly our past actions and to seek out and correct any instances in which—through changing conditions—such actions have become out of gear with the public convenience and necessity. Our views in this regard are most accurately summarized by the Supreme Court in *American Trucking Assn.* v. *Atchison, T. & S. F. Ry. Co.*, 387 U. S. 397 (1967), when it said:

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[15] "Rule" means the whole or any part of any agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or to describe the organization, procedure, or practice requirements of any agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing upon any of the foregoing. "Rulemaking" means agency process for the formulation, amendment, or repeal of a rule.

> "*** in any event, we agree that the Commission, faced with new developments or in light or reconsideration of the relevant facts and its mandate, may alter its past interpretation and overturn past administrative rule and practice. ***"

We would also note that opponents of the rule proposed in Ex Parte No. MC-68 claimed they were entitled to an adjudicatory hearing. There, as here, the motor carriers and all interested parties had filed written statements. In this proceeding, the Commission was prepared to hold hearings but the parties did not desire them.[16]

More recently in Ex Parte No. 272, *C.O.D. and Freight-Collect Shipments*, 343 I.C.C. 692, 695 (1973) we stated that:

> One of the most important functions this Commission performs is the continuing evaluation, in the public interest, of the activities engaged in by the carriers we are charged with regulating. Whenever circumstances cause the provision of the carriers' various services to be significantly altered or obstructed, we have a duty to the public to inquire into and, if statutorily authorized, to deal with the matters involved. Publication by many regulated carriers of tariff provisions by which they restrict or eliminate the availability to the public of the freight-collect and other services *** is such an instance. Thus, our primary purpose here is to determine the nature and extent of this problem and the action, if any, we should take on an industrywide scale as best to serve the public's interest in these services now and for the foreseeable future.

On the issue of burden of proof, the carriers say that because the practices in question are contained in tariffs which have been in effect for some time and because the Commission's case law places the burden of proof in a proceeding investigating existing rates that are in effect on the party contending that the rates or charges are unlawful, that they do not have the burden of showing that the practices which result in these charges are reasonable.[17]

Similar arguments as to the burden of proof in a Commission rulemaking proceeding were answered by the Supreme Court in *American Trucking Associations* v. *U. S.*, 344 U.S. 298 (1953) at page 318-320:

> We need not pause long over certain procedural objections which appellants have interposed. They object that the rules were the product of proceedings fatally at variance with certain requirements of the Administrative Procedure Act. Appellants *** point to the requirement of § 7(c), that "the proponent of a rule or order shall be the burden of proof," and insist that the Commission *** did not satisfy this burden of preponderating evidence. But even assuming that the Commission was a statutory

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[16] See report of prehearing conference.

[17] For a discussion of the burden of proof in rate proceedings before the Commission see *Liquid Sugar to Ohio Points*, 306 I.C.C. 298 (1959).

> "proponent" of the regulation and that it did not actively introduce the requisite degree of proof in support of its position, we think it plain that the requirement is inapplicable to the instant proceedings. For § 7 of the Administrative Procedure Act is limited by its own terms to "hearings which section 4 or 5 requires to be conducted pursuant to this section." Turning to those sections it is found that they invoke § 7 only when specified by statute: "Where rules are required by statute to be made on the record after opportunity for an agency hearing, the requirements of sections 7 and 8 shall apply in place of the provisions of this subsection." In short, § 7 applies only when hearings were required by the statute under which they were conducted to be made on the record and with opportunity for oral hearing. As we have pointed out, the rule-making authority in the instant case stems from § 204(a)(6) of the Motor Carrier Act; nothing there requires record or hearing, in direct contrast with the rate-making procedure provisions of §§ 216(e) and 218(b).

When we began this proceeding, we cited our authority under part II of the act and mentioned sections 204(b) and 208(a). Both of these sections bestow broad powers on the Commission which, unlike the sections dealing with complaints and the investigation and suspension of rate filings, do not require hearings for their implementation. We believe, therefore, that this situation is in line with the views of the Supreme Court. While the carriers do not say that the Commission has the burden of proof, it is the logical next step from their repeated assertions that the burden does not lie with them.[18]

Perhaps the rulemaking process is best described by Davis in his text on administrative law.[19]

> The rulemaking procedure marked out by the Administrative Procedure Act, 5 U.S.C. A. § 553, is especially successful. The central feature is publication of proposed rules, with an invitation to interested parties to make written comments. The agency's staff then sifts the comments and revises the rules. Then the rules are published but do not become effective for thirty days after publication; protests thus can be directed to the final version. The procedure is both fair and efficient. Much experience shows it works beautifully. Good agencies are more and more tending to use this rule-making procedure even when they are not required to.

Almost all our notices and orders have stressed our belief that this proceeding is of substantial importance to the shipping public. The parties have had the opportunity to file initial statements, reply statements, and briefs. All of this material (see appendix A) has been considered and we believe provides a rational basis for our decision to adopt paragraph 1 of the rules proposed.

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[18] It is interesting to note that the Committee reports to section 7 of the Administrative Procedure Act (Sen. Doc. No. 248, 79th Cong., 2d Sess. 208, 270, 1946) explain "that the proponent of a rule or order has the burden of proof means not only that the party initiating the proceeding has the general burden of coming forward with a prima facie case but that other parties who are proponents of some different result also for that purpose have a burden to maintain."

[19] Davis, Kenneth Culp, "Administrative Law Text," Chap. 6 Rulemaking 3rd ed. 1972.

We have accepted for sometime the basic premise that general-commodity carriers' line-haul rates include one pickup and one delivery. In *Distribution Rates at Chicago, Ill., and St. Louis, Mo.*, 318 I.C.C. 145, 148 (1962), we held that:

> Since under ordinary line-haul rates the shipper is entitled to one delivery at no extra charge, the cost of one of the deliveries under the distribution rates is properly chargeable to the line-haul movement.

Line-haul rates are based on the carriers' average operating experience so that the carriers' experience in serving homes, apartment houses, churches, and camps would have been included in the cost considerations which led to the line-haul rate levels. We reject the carriers' contention that their rates and charges only consider their average normal experience in serving businesses. The general public has never been so narrowly defined and we have often taken steps to assure that they hold themselves out to the public generally. In *Removal of Truckload Lot Restrictions, supra,* at page 474, we said the following:

> Motor common carriers are a public institution. They are engaged in what has always been regarded as a public business, and by reason of this status they are subject to severe legal obligations. They must, according to their abilities, serve all who seek their services, and serve them equally and fairly. They cannot pick and choose.

It is obvious on this record that carriers do not want to serve private residences and the like, probably because much of this traffic appears to be lightweight, single shipments; however, they do not hesitate to use this traffic to justify higher minimum rates and charges, increased rates for LTL traffic and single-shipment accessorial charges.

The carriers had every opportunity to make a persuasive showing that these charges were justified. All parties were asked at the prehearing conference whether they were satisfied with the record and all said yes. The carriers made no mention of wanting or needing additional time to develop cost data so their contention that the evidence is the best they could furnish in the time available is entitled to little weight. The deficiencies in their cost presentations are discussed in appendix C.

This record raises several factual contradictions. The motor carriers claim that without advance notice there is almost always no one present to accept delivery. Yet United Parcel Service which handles more of this traffic than most of the motor carriers who filed representations is able to accomplish delivery in the "great majority" of instances on the first attempt. Also the carriers' argument that residential deliveries almost always occur far from where they accomplish most deliveries is not supported by the mileage comparisons of residential and other deliveries. See appendix C. Thirdly, the carriers contend that residential deliveries almost always necessitate inside delivery but that the latter is not assessed a separate charge when it occurs at a residence. It appears that this is true in most tariffs; however, it is not clear that the two are always mutually exclusive since some of the parties complain that they have paid both charges on the same shipment. Perhaps most important, it is not clear on this record that inside deliveries occur on most residential deliveries. While the motor carriers made general assertions about the various extra services required, they did not give specifics on how often the services were required or how often the problems mentioned, i.e., children in the streets, obstructing trees and wires, et cetera, were encountered. In a statement that did give specifics, Consolidated Freightways Corp. of Delaware showed the following results of a 1-week survey of 66 residential stops:

Back door/porch	2
Bedroom	1
Curbside	17
Garage	26
Main floor	
Front door/porch	13
Living room	
Inside house	
Patio	1
Customer pickup	1
Nondelivery	2
Upstairs	3

It appears from this breakdown that 46 or better than two-thirds of the residential stops (curbside, garage, back door/porch, and customer pickup) did not necessitate inside delivery and it seems that the number would go higher if we knew more about those deliveries included in the category, front door/porch et al.

On the subject of rural versus urban operations, the parties have mentioned report number RF 3491-TR-1 prepared by Ohio State University for the Urban Mass Transportation Administration. On page 16 of that report there appears a discussion of urban truck facilities and the point is made that most central business districts were built long before the truck came upon the scene so that narrow streets, twisting alleys and other features of the older sections of most American cities make maneuvering in the central business district difficult. The city studied was Columbus, Ohio. Only about 12 percent of the buildings in its central business district have offstreet loading facilities.[20] This means that the carriers must find a parking space at the curb and maneuver among the sidewalk pedestrians in order to make the pickup or delivery. The report concludes that the competition between freight and people for the limited right-of-way seriously impedes the efficient movement of urban goods.

In *Commercial Zones and Terminal Areas*, 124 M.C.C. 130, 161 (1975), and 128 M.C.C. 422 (1976), we adopted new regulations more in tune with the contemporary economic reality which is that business and trade establishments are spreading to outlying suburban areas. We stated in our report that:

> It does appear that there is an evolving location pattern for metropolitan economic activity. The central city remains the home of administrative, financial, and service functions, activities which are compatible with multi-stored environments in concentrated urban centers. *Manufacturing and wholesale and retail trade, prime users of transportation services, are shifting to suburban locations*, where land is available for single-story industrial plant technology. *Shippers state that* while central city headquarters are maintained in some cases, *new facilities for manufacture and warehousing are built in outlying areas*. [Emphasis added.]

We believe it to be a matter of common knowledge that many businesses, including trucking terminals, are moving outside the central city.[21] We also believe that condominiums, cooperatives, and high rise apartment buildings with loading facilities and people on duty either to accept traffic or to direct persons to an apartment or business conducted in the building and shopping centers close to residential developments are not the aberrations which the motor carrier participants in this proceeding would have us believe them to be. We think it unfair, unjust, and unreasonable for carriers to assess extra charges against all receivers in a particular class when the carriers admit that many of the locations do not have the traits which are supposed to be the basis for the classification. We previously mentioned the acknowledgment by several carriers that some residential service is problem free and that many, perhaps even most, residential deliveries go to receivers who use motor common carrier service periodically and have adapted their receipts in a manner compatible with efficient motor carrier operations. This record does not show that assessing an accessorial charge on shipments merely because they go to other than business locations is justified.

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[20] Study cites as authority for this statistic Battelle Memorial Institute, "Urban Goods-Movement Design," Washington, D.C.: Urban Mass Transportation Administration, June, 1972.

[21] Marino, John H., "Urban Goods Movement The Key to Improved Transportation Productivity," 14th Annual Meeting, Transportation Research Forum, p. 270.

We are not saying that there cannot be instances where a pickup at or a delivery to a particular place incurs additional costs for which carriers should receive more than the line-haul rate. However, the way these charges are now being assessed results in an unreasonable, an unfair, and a discriminatory practice by the carriers and we declare this practice to be unlawful for the future.

Some of the parties are fearful that our decision will cause the carriers to make applicable inside pickup and delivery charges on residential shipments so that they will still be paying the same amount. This argument misunderstands our objective here. We have not been dealing with rate levels in this proceeding but with a general carrier practice. People who believe that charges have been improperly assessed have remedies in established Commission procedures. In addition, we will direct the Consumer Unit of the Tariff Examining Branch of this Commission's Bureau of Traffic to bring to our attention any attempt by the carriers in their tariffs to thwart our findings in this decision.

Paragraphs 2 and 3 of the proposed rules would require agreement between the carrier and shipper or receiver before the carrier attempts to deliver a shipment to the locations mentioned in the first paragraph. Only when an agreement has been reached and because of the consignees' fault the carrier is unable to make delivery will it be able to assess charges for notification, arrangement, and redelivery. The same type of agreement, applies to redelivery as outlined here for the initial delivery.

Attorneys for the motor carrier rate bureaus go on at great lengths on how requiring carriers to give notice to receivers before attempting residential deliveries will be very expensive, will wreak havoc on the carriers' normal operations, and will give residential traffic preferential treatment. These arguments are entitled to very little weight since many of the individual carriers statements acknowledge that as standard operating procedure they require their personnel to set residential deliveries aside until a receiver is contacted and agreement is reached on when delivery should be attempted.[22]

All example of the way many carriers handled residential deliveries is found in the verified statement submitted on behalf of I&S-McDaniel, Inc., of Vincennes, Ind.:

> With respect to private residential deliveries I&S-McDaniel has since 1970 maintained that the costs of redelivery were greater than the costs of prenotification, hence the company policy spelled out in Exhibit I was established.

Exhibit I which is a page from the company's Policy and Procedures Manual, directs personnel to do the following:

> Hold all shipments requiring private residential deliveries on your dock.
>
> 1. Phone the consignee and advise him that you have a shipment on your dock for him to pick up. (THINK POSITIVE) Advise him your location, hours of operation, charges due and payable in CASH or money order—no personal checks, and other pertinent date.
>
> 2. If he requests delivery, advise him the same facts as in 1 above, also the residential delivery charge applicable, also cash payment required. Arrange a time for delivery, instructions on address if you aren't familiar with area, additional help for unloading if necessary, and other particular facts you may need.
>
> 3. If no answer to your phone call, send consignee one copy of the post card form. A carbon copy should be attached to your copy of the freight bill for future use in processing storage charges, reconsigning or returning to the shipper with his permission. (See page 8-2, Operations.)

It appears from this record that the motor carrier experience shows it to be more practical, efficient, and economical to give residential receivers advance notice of deliveries. This being the case, it appears reasonable to require all motor common carriers to do so before they assess redelivery charges.

The following initial statements: Alleghany Corporation, d.b.a. Jones Motor, Helm's Express division of Ryder Truck Lines, Inc., Wooleyhan Transport Company, O.N.C. Freight Systems, the Motor Carriers Traffic Association, Inc., Sternberger Motor Corporation, and Rooks Transfer Lines, Inc. Also the verified statements of Robert E. Gifford, of Interstate Motor Freight System, Thomas J. O'Loughlin, Jr., of Law Motor Freight, Inc., and Michael R. Solomon of Western Trucking Company included as part of the initial statement of the Eastern Central Motor Carriers Association, Inc., the verified statements of Gerald E. Hawkes of Garrett Freightlines, Inc., H. Lynn Davis of IML Freight, Inc., and Henry A. Dahn of Milne Truck Lines, Inc. included as part of the initial statement of the Motor Common Carrier Tariff Bureaus, the verified statement of Jerry K. Neal of Colonial Motor Freight Line, Inc. submitted as part of the supplemental initial statement of the Southern Motor Carriers Rate Conference, Inc., and the verified statements of Alfred F. Bauman of Budig Trucking Co., E. C. Niemeyer of Lovelace Truck Service, Inc., L. G. Wittry of Commercial Motor Freight, Inc., C. James McCormick of I&S-McDaniel, Inc., and Richard S. Appleback of Associated Truck Lines, Inc., submitted as part of the supplemental initial statement of the Central States Motor Freight Bureau, Inc.

The carriers contend that requiring advance notice of residential deliveries would give this traffic preferential treatment. On the other hand, these same interests contend that commercial traffic does not require such notice. Similarly, the Commission's Bureau of Investigations and Enforcement is of the view that such tariff distinctions, i.e., those based on the status of the occupier of the delivery point and not upon difficulty in effecting delivery, are discriminatory. Using this reasoning it proposes that prenotification by the carriers be discretionary in all instances regardless of whether the shipment is destined to a residential or a commercial location. It would also require, however, that only in the event that a carrier elects to prenotify the consignee of the date and approximate time of delivery, may it assess a redelivery charge upon the consignee's failure to take delivery.

We do not agree with the carriers' contention of preferential treatment, or with the position of the Bureau of Investigations and Enforcement. The record does not support an allegation of undue preference, prejudice, or discrimination. In order to support such an allegation under section 216(d) of the act, there must be found that a particular person, port, gateway, locality, or description of traffic is unduly or unreasonably favored to the disadvantage of another. *Arrangements—Arrow Carrier Corp. and Duplan Silk Corp.*, 4 M.C.C. 657, 677 (1938); and *Classification Ratings, Boxes or Crates*, 335 I.C.C. 754, 758 (1970). Also it must be shown that the transportation characteristics and circumstances surrounding the transportation from or to both the alleged preferred and prejudiced points must be substantially similar. *Lake Charles Harbor & Term. Dist. v. Atchison, T. & S.F. Ry.*, 315 I.C.C. 485, 489 (1962).

Here we are dealing with two distinct type of receivers. Prenotification of pending delivery of a shipment is less necessary to the commercial receiver than to the residential receiver. Their normal business hours are more likely to be known to and compatible with those of the carriers, and their employees generally are or should be available to receive shipments during normal business hours. While there may be exceptions to this,[23] there are tariff provisions whereby commercial shippers/receivers may request prenotification of a pending delivery. In such case the tariffs provide for this assessment of a charge for the prenotification. On the other hand, the residential and other similar type receivers are generally not aware of those tariff provisions. In any event, without such prenotification the chances of effecting delivery during the carriers' normal business hours, at best, is a hit-and-miss proposition. For example, in the case of residential deliveries it cannot be expected that the housewife would be in attendance at all times during the carriers' normal business hours, and in many cases both husband and wife are working. It seems, therefore, that the differences between commercial receivers and other types of receivers are substantial, and that these dissimilarities are such as to preclude a finding that the proposed rules would work an undue preference, prejudice, or discrimination.

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[23] See also, Ex Parte No. MC-88, *supra*, at 789, where section 1(f) of the rules governing the detention of vehicles with power units provides, "Nothing in this item shall require a carrier to pick up or deliver freight at hours other than carrier's normal business hours. This shall not be construed to restrict a carrier's ability to accept pickup and delivery schedules at hours other than its normal business hours." This provision was necessitated as a result of commercial shippers attempting to curtail unrealistically the times at which they will accept the pickup or delivery of freight.

The thrust of this proceeding has been to determine whether residential and similar type delivery, per se, warranted treatment different from that accorded to commercial-type accounts. We believe that it has been shown, on the record, that such different treatment is warranted, and that, accordingly, the proposed prenotification requirement should be adopted. The record further establishes that such a requirement will not have the effect of discriminating against commercial-type accounts within the meaning of section 216(d) of the act. The proposed rule will, therefore, be adopted.

FINDINGS

We find that the extra charges in tariffs for motor common carriers of property for service to or from specified premises such as private residences, apartments, churches, schools, and camps which result in higher rates and charges than on service to commercial locations to be unreasonable and in violation of the Interstate Commerce Act; that redelivery charges are unreasonable in each situation where there is no agreement between the carrier and the consignor or receiver as to the approximate date and time when the carrier will attempt delivery; that the differences in delivery characteristics between recognized commercial locations and private residences, apartments, churches, schools, camps, and other such locations, warrants a prenotification requirement in the case of the latter; that our purposes in this proceeding, therefore, will be served best by adoption of the proposed rule; and that this decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

An appropriate order will be entered.

COMMISSIONER MURPHY, concurring:

I am in general agreement with the majority in its efforts to eradicate unreasonable charges imposed upon shippers simply by their location at private residences, apartments, churches, schools, camps, and similar facilities. Nevertheless, some aspects of the proposed regulations are troublesome and may duplicate existing regulations. See, for example, 49 CFR 1056, pertaining to the transportation of household goods. Additionally, while the proposed regulations may cause little or no inconvenience to motor common carriers operating over regular routes, those carriers operating over irregular routes generally do not have the same extensive terminal facilities and may experience substantial difficulties in complying with the regulations. See also, section 208(a) of the Interstate Commerce Act, 49 U.S.C. 308(a).

My principal concern lies with the implications in the majority's decision that a motor common carrier has a statutory, not a tariff-imposed, duty to provide pickup and delivery. See, in that respect, my separate expression in *Unloading Restrictions on Meats & PHP*, 349 I.C.C. 189, 201-202.

COMMISSIONER CHRISTIAN did not participate.

APPENDIX A

Initial statements

Ad. Seidel & Son, Inc. (Seidel), manufactures and distributes a variety of food products. Included on its customer list are some 1,200 summer camps operated by churches, youth organizations, and private individuals. A selection of 261 freight bills covering shipments to camps between May and June 1975 reveals that 57 were assessed camp delivery charges, the average weight per shipment was 1,500 pounds and the average freight charge per shipment was around $40. Seidel complains that the inconsistent application of the camp delivery charges creates problems since it is its policy to prepay freight charges.

All-American, Inc. (All-American), of Sioux Falls, S.D., is a motor common carrier of general commodities authorized by the Commission to operate in 13 Midwestern States. All-American operates a pickup and delivery service at commercial locations as well as private residences, apartments, churches, and schools.

All-American urges that the additional charges for residential delivery are justified because of the additional expense and time involved in handling the residential traffic. It contends that there is additional expense incurred in locating and traveling to the private residences and also in making the actual pickup or delivery. The All-American dispatchers are knowledgeable as to the location of the commercial customers but must spend a considerable amount of time locating private residences and in directing drivers to the location. The commercial customers generally have unloading platforms which are level with the floor of the vehicle which greatly eases the unloading. The platforms are not found at private residences which results in more difficult unloading. At a commercial site, the carrier is helped by receiving or shipping clerks who are not available when delivering to a private residence. In addition, residential streets and driveways are not properly designed for the operation of the carrier's equipment which is generally too large for the street. All-American urges that the present line-haul rate provides for one pickup and one delivery and does not take into account the extraordinary services performed at residential deliveries which must be compensated for.

Alleghany Corporation, doing business as Jones Motor (Jones), is a motor common carrier of general commodities over regular and irregular routes. Jones operates in the District of Columbia and a 21-State area embraced by Nashua, N.H., in the Northeast, Charlotte, N.C., in the South, and Fort Madison, Iowa, and St. Louis, Mo., in the West. In 1974 Jones had gross revenues $81,202,000 and handled 1,094,289 shipments. Of this total traffic 21,000 shipments involved private residence charges for revenue of $103,130. Based on these figures, private residence shipments represented 1.9 percent of its total shipments and 0.13 percent of its total revenue. Shipments from a private residence represented less than 5 percent of the total private residence shipments. The private residence shipments averaged 337 pounds per shipment compared to an average weight per shipment of 3,216 pounds for all types of shipments. As standard operating procedure, Jones holds private residence deliveries on the freight dock until the consignee is contacted by telephone. At that time a delivery schedule and helper service (if needed) are arranged and the consignee is advised of the charges due on the shipment. If the consignee cannot be reached within 24 hours from the time the shipment arrives at the delivery terminal, an on-hand notice is issued. In practically all instances, the shipment must be held at least 24 hours before delivery can be accomplished and quite frequently the shipment must be held 12 days or more. This requires additional dock space and rehandling and subjects the freight to pilferage and damage.

The American Association of Nurserymen, Bicycle Manufacturers Association, Hobby Industry Association of America, Juvenile Products Manufacturers Association, National Association of Furniture Manufacturers, National Furniture Traffic Conference, Inc., National Home Furnishings Association, National Office Products Association, National School Supply and Equipment Association, National Wholesale Furniture Association and the Toy Manufacturers of America (collectively referred to as the associations), submitted a statement in support of the proposed rule.

A brief historical sketch of residential delivery charges is given which recites that originally there were no extra charges for home deliveries. The specialized furniture carriers were the first carriers to charge extra for home delivery and the general-commodity carriers followed suit.

The associations contend that the residential surcharge should not be applied on all deliveries to structures other than commercial establishments, without regard to the difficulty involved in making the delivery. It is suggested that schools are easy to serve because many have receiving docks and janitorial assistance for unloading and it is thus unfair to put schools in the same category as private residences. It is urged that extra charges be assessed only when it be determined that the carriers are spending extra time and effort in making the delivery.

The associations do not believe that there should be mandatory prenotification on all shipments moving to private residences but that shippers should be encouraged to include the consignees' phone number on its bill of lading. With the bills of lading so noted, carriers who desire to contact the consignee would be able to do so more easily. The associations also believe that redelivery charges should apply uniformly to all consignees where, through no fault of the carrier, it is unable to accomplish delivery during normal business hours. It is urged, however, that before a residential shipment is redelivered the consignee should be first notified and a delivery time agreed upon.

It was also urged that the carriers should give the residential consignee printed information regarding handling claims and inspection of the shipment prior to acceptance.

The American Camping Association, Inc. (ACA), of Martinsville, Ind., is a nonprofit corporation representing over 3,000 organized camps which operate throughout the United States. The ACA supports the proposed rule primarily because of the existing unfairness in classifying camps in the same rate classification as private residences. The ACA asserts that camps should be considered commercial establishments for rate purposes because many camps have receiving platforms and there is generally camp personnel available to help unload the vehicles. Thus, ACA urges that there is no rational basis for considering camps in any rate classification other than that as a commercial establishment. The ACA also contends that the accessorial charge, in itself, is unreasonable. In support, four bills were submitted showing the line-haul charge, the camp delivery charge, and the resulting percentage increase. Two of the four bills were for intrastate traffic moving within New York. These bills show line-haul rates of $11.95 and $26.80 with a camp delivery charge of $8.48 for both. This resulted in a 70.9- and a 31.6-percent increase, respectively, over the line-haul rates. The remaining two bills were for interstate traffic and show a line-haul rate of $3.75 and $11.96 and a camp delivery charge of $7.84 and $8.48, respectively. This represents a 209 and a 75-percent increase over the line-haul rate. The ACA alleges that the camp delivery charges are unreasonable, especially because many of the camps are nonprofit organizations.

Counsel for the American Camping Association submitted verified statements from Jules F. Bernard of Bernard Food Industries Inc. (Bernard), and Robert Fischer of Sanco Equipment Corp. (Sanco). Bernard does approximately 10 percent of its institutional food business with camps. It believes that the charges are being applied arbitrarily and there is no way it can know in advance if they will be applied. Sanco complains that the camp delivery charge is sometimes more than 50 percent over and above the minimum delivery charge. Sanco agrees that some camps are difficult to get to but others are not.

The American Retail Federation (Federation) of Washington, D.C., is a national association of retailers comprised of 50 statewide and 31 national associations. The Federation is interested in this proceeding because of the increased reliance placed by retailers upon motor common carriers for residential deliveries. Retailers have become dependent upon the motor common carriers as a result of the demise of REA Express and the unavailability of United Parcel Service. The Federation supports adoption of the proposed rule which it believes would prohibit self-imposed tariff restrictions which have lessened the carrier's obligations to the public. The Federation urges that residential accessorial charges act as a tacit embargo of such freight and also has the effect of encouraging private carriage. The Federation requests that the Commission adopt standards of general applicability in determining just and reasonable charges for residential deliveries and that the Commission take into account the carrier's labor contracts.

The Bureau of Investigations and Enforcement of the Interstate Commerce Commission (Bureau) supports the proposed rules in order to alleviate numerous complaints received by the Commission. The Commission has received 60 documented complaints as well as 374 telephone complaints regarding the residential delivery charge and 651 such complaints regarding the redelivery charges.

The Bureau suggests that the distinction made for "walk-in" businesses may be artificial at best. It argues that locations which are not open to the walk-in public may be as readily accessible to trucks as are commercial locations. The Bureau notes that many schools, churches, and apartment complexes are designed with loading docks and other facilities for the loading and unloading of freight. It also suggests that the residential consignee is often surprised when he has to pay an additional charge on a shipment which was marked prepaid. Similarly, it is alleged that the residential delivery charge together with any possible redelivery charges are disproportionately high compared to the line-haul rate.

The Bureau urges adoption of the prior notification rule because it states that redeliveries most often occur because the consignee is not given prior notice. The Bureau states that the advance notice requirement would be beneficial to both the carrier and the consignee in saving money, time, effort, and frustration.

Central Freight Lines, Inc., Central Express, Inc., Red Arrow Freight Lines, Inc., Saia Motor Freight Line, Inc., and Alamo Express Inc. (respondents), are general-commodity motor common carriers conducting operations in Texas and Louisiana. Respondents oppose the proposed rules primarily because the costs involved in serving the residential customer exceed those involved in serving the commercial customer. It is also urged that the proposed rule regarding redelivery charges would not be in the public interest because it would be disruptive of existing delivery procedures.

Respondents state that the existing residential delivery charge is justified because of the inherent difference between residential and commercial areas, the absence of freight-hauling facilities at residential premises and the extraordinary handling required for residential shipments. It is suggested that the extra services and the resulting added costs involved in making residential deliveries, must be charged to the residential customer in accordance with section 216(b) of the Interstate Commerce Act.

It is argued by respondents that the residential deliveries are more costly to make because drivers are not familiar with the residential neighborhoods which often have narrow streets with low speed limits, vehicle weight restrictions and low-hanging utility wires. Drivers also are confronted with children playing in the streets and shipments which are inaccurately addressed.

There generally are no freight-handling devices to help unload the vehicles at a private residence whereas such equipment is the norm at a commercial establishment. The freight, oftentimes consisting of large appliances, must be hand carried by the driver and a helper from the parked vehicle to the residence. This involves dispatching two employees per vehicle and also using equipment with power-lift tailgates.

It is further charged that residential shipments interrupt the flow of freight at the terminal because such freight often is segregated from the commercial freight and put in storage to arrange for a suitable time for delivery. Residential freight also must be docked, at times, so that the proper address of the consignee can be found.

The existing redelivery charges are alleged to be necessary in order to compensate the carriers for the additional expense involved in making a repeat delivery. Prenotification is stated to be unworkable because it would disrupt existing delivery procedures by disrupting the normal flow of freight from the line-haul vehicle to the delivering vehicle, and in effect would discriminate against the commercial receivers who do not require prenotification. Additionally prenotification would be an overwhelming burden, operationally and financially, because of the time involved in attempting to contact the consignee.

In sum, respondents contend that the average cost of a pickup or delivery of a residential shipment exceeds the average cost for effecting the pickup or delivery of a commercial shipment and that prenotification to residential customers would be too costly and burdensome.

Supplementary statements were submitted by the Central States Motor Freight Bureau, Inc., consisting of individual verified statements by several member carriers. The verified statements of Associated Truck Lines, Inc., Budig Trucking Co., Lovelace Truck Service, Inc., Western Trucking Company, Commercial Motor Freight, Inc., and I&S-McDaniel, Inc., collectively and severally oppose the proposed rules.

The carriers contend that the residential deliveries consume considerably more time and require more services than do the commercial shipments. Drivers are usually more unfamiliar with residential neighborhoods than they are with commercial districts and thus extra time must be spent in locating the residence. Oftentimes deliveries are destined to new residential subdivisions which do not have the streets properly platted nor identified. Local ordinances often restrict the weight of the vehicle which can operate over residential streets which thus requires circuitous routing or investment in smaller vehicles. Similarly, narrow residential streets with overhanging branches and wires restrict the type of equipment which may be utilized.

The problem of finding no one home to receive delivery is a primary cause for the additional handling and expense involved in residential deliveries. Several carriers, i.e., Associated Truck Lines, Inc., Budig Trucking Co., Lovelace Truck Service, Inc., Western Trucking Company, Commercial Motor Freight, Inc., and I&S-McDaniel, Inc., attempt to provide residential consignees with notice prior to the initial delivery which has partially cured the problem of finding no one home. This involves added administrative and labor expenses in telephoning the consignee or mailing notices. There is generally no problem finding the commercial consignee present without prenotification, during normal business hours. The actual handling of the unloading at private residences takes more time and physical effort than at business establishments. At a business establishment the carrier generally backs into a receiving platform and is assisted by the receiver's personnel in unloading the lading. At a private residence the carrier must often park the vehicle quite a distance from the home, unload the freight unassisted, and carry it to a particular room in the house. This can delay the driver for a much greater amount of time than at a commercial stop while the revenues to the carrier are often less. The carriers usually perform the additional services at the private residence to please the consignee because the consignee expects the common carrier to perform the same delivery service as would a retail establishment's private delivery service. There are also delays encountered on collect shipments when the residential consignee does not have proper funds to pay for the freight.

It is also contended that additional charges for deliveries to other noncommercial establishments are justified. Schools cannot be delivered to after 3:30 p.m. and oftentimes the janitor is too busy to help unload. Apartment buildings have no unloading or loading facilities and the problem of finding the consignee home is also present. Churches are difficult to serve because the spiritual leader, who is the only one authorized to sign for the freight, is often not present. Camps do not have personnel to help unload and can only be delivered to during certain hours. Construction sites are difficult to serve because of muddy road conditions, the lack of available funds on collect shipments and the difficulty of finding the person with the proper authority to sign for the freight.

It is submitted that the basic rate structure provides for one pickup and one delivery, which assumes that the pickups or delivery services will be from and to the consignor's and consignee's facility without further demands on the carrier to perform additional services, which are not provided for in the motor carrier rate structure.

C. F. Emling Company specializes in institutional food products. It sells to approximately 200 camps located in 15 States in the East and Midwest. During May 1976, additional charges to camps ranged from $7.73 to $39 plus a notification charge of $5.19. It believes it is contradictory to assess extra charges for camp deliveries and none for deliveries to schools and hospitals.

The Eastern Central Motor Carriers Association, Inc. (association), contends that due to the very unique aspects of private residence service substantially more costs are necessarily incurred than are properly includable in the rate structure of the general-commodity carriers. Because the motor common carriers engage in nearly 99 percent commercial service their operations and rates are centered around commercial circumstances. The association believes that the proposed rules would mandate a subsidization of residential service by commercial freight and, even more frightening, subsidization of smaller weighted, LTL shipments. Also adoption of the rules would undermine the Commission's attempts to properly price the various segments of motor carrier traffic in Ex Parte No. MC-98, *New Procedures in Motor Carrier Restructuring Proceedings*. Contrasting residential and nonresidential deliveries, the association notes the following: private residences are not ordinarily structured to receive shipments; this type of traffic commonly involves handling freight to levels above or below the vehicle, since the carrier has no freight handling equipment on its vehicle residential deliveries must be effected manually, many times there is no one at the residence to assist in pickup or delivery, out of courtesy drivers often attempt inside deliveries, private residents are unfamiliar with shipping documents, private residences maintain no "at home" hours, problems are incurred in finding the residence, residential deliveries are susceptible to liability claims, and children and pets make parking motor carrier equipment a problem. All of these problems are discussed by motor carrier operating personnel in verified statements attached to the association's initial statement. These include the statement of William E. Knapp of Cook Motor Lines Inc.; Thomas M. Henry of Eastern Express Inc.; Robert E. Gifford of Interstate Motor Freight System; Joseph F. Cassidy of Alleghany Corporation doing business as Jones Motor; Thomas J. O'Loughlin, Jr., of Law Motor Freight Inc.; Samuel F. Austin and Donald W. Boles of McLean Trucking Company, and Thomas A. Dolson of Roadway Express Inc.

Witness Knapp states that while he has not tabulated the number of private homes or apartment houses which Cook Motor Lines, Inc. (Cook), serves, his years of experience provide an innate grasp of the general "nuisance" character of such shipments. The territory served by Cook involves peddle runs of from 25 to 100 miles or more. It does not generally hold itself out in its tariffs to provide prior notification but does for its own convenience occasionally telephone or send a postcard to a receiver. Witness Henry of Eastern Express Inc. (Eastern), submitted the answers to 11 questions received from personnel at four of Eastern's major terminals. Two of the terminals call in advance to make sure the consignee is available, obtain directions, and to advise the consignee of the approximate time of arrival so as to preclude redelivery. Two other terminals do not call unless the bill of lading contains specific instructions for advance notification. Most of the responses indicated that it took more time and vehicle travel to accomplish residential deliveries. The type of traffic involved was said to be primarily salesmen's samples, clothing demonstrators, applicances, greeting cards, toys, books, candy, drugs and toilet preparations, and premium redemption coupons. Using a 4-week study in 1974, Interstate projects its revenue from performing pickup and delivery service at private residences to be approximately $150,000 in 1974 accruing from approximately 15 to 20,000 shipments. Its gross revenue that same year was approximately $144 million. Interstate concluded some time ago that tendering shipments for delivery to private residences without any prearrangement between the carrier and the consignee often resulted in rehandling and redelivery. Therefore, as standard operating procedure, Interstate has set out procedures for its convenience which terminal personnel must follow when performing delivery service on shipments moving c.o.d., order notified or to private residences. These procedures include telephone calls to the consignee to arrange delivery. In the event that initial delivery is not accomplished, Interstate leaves what it calls a doorknob hanger which informs the consignee of Interstate's attempt to deliver the goods. This notice sets forth specific information relative to the shipment and requests the consignee to notify Interstate at the telephone number shown to make arrangements for a redelivery. If the consignee prefers to save the expense of the redelivery charge, he may pick up the shipment at the Interstate's local terminal. Interstate believes it provides adequate notice involving redelivery service to all consignees. Witness O'Loughlin of Law Motor Freight Inc. (Law), states that in 1974, Law delivered 1.47 percent of all its shipments to private residences. Over 90 percent of these shipments weighed less than 500 pounds. In terms of revenue these private residence shipments accounted for slightly less than 1 percent of Law's gross income. The average revenue per shipment was $14.79 to private residences as compared to Law's system average of $23.18 for all shipments. It believes that the revenue earned from private residence shipments is extremely sensitive since its average hourly cost for drivers alone was $18.61 and its production rate for pickup and delivery (inclusive) is a litte more than three-fourths of a shipment per man-hour. Witness O'Loughlin testified that his company finds the logistic and operating conditions on residential service substantially different from business/industrial locations. It considers camp deliveries even more difficult and time consuming. In a year's time it does not handle more than 50 or 60 such shipments systemwide. In all of these cases (residences, camps, and churches) Law's operations people arrange for the delivery through prenotification of the account. Witness Sameul F. Austin of McLean Trucking Company (McLean) states that McLean participates in the generally applicable private residence rules which apply only on pickup or delivery at private residences and camps (other than military). Mr. Austin points out that the pickup or delivery charge at a private residence includes handling which is covered by a separate "handling freight not adjacent to carrier's vehicles" charge in the case of commercial pickups or deliveries. The result, in his opinion, is that the service at private residences include service not available at commercial establishments without an additional charge. To make the point that the carriers are exposed to damage claims in providing private residence delivery, Mr. Austin cites three claims which occurred between May and November 1975. Witness Donald W. Boles of McLean testifies that there are 10 different circumstances or peculiarities for every 10 private residence deliveries. This witness believes that the proposed prenotification is impractical but he notes that certain residential receivers, such as the "Avon Lady," make arrangements with the carrier so that they find out when the freight is ready and make preparations to accept it. However, persons who only receive freight once do not know carrier limitations and yet they expect the most service. Witness Thomas A. Dolson of Roadway Express, Inc., states that it is difficult to put a price tag on the many hidden costs and risks concurrent with common carrier vehicles making delivery in residential areas. He believes there is no question but that some residential deliveries are easier than some commercial ones, but then, so are some commercial sites more accessible than other commercial sites. Mr. Dolson contends that the rates of motor common carriers are less than REA, United Parcel, household movers, et cetera, because these rates do not include residential deliveries, inside the house service, removal of cartons, unpacking, prenotification, etc. REA and United Parcel specialize in small package service and can, therefore, use smaller trucks. Also their charges must be prepaid, something the motor carrier industry has been unable to obtain. Witness Michael R. Solomon of Western Trucking Company always calls and schedules deliveries on residential shipments and on shipments to schools, apartment houses, et cetera.

On the issue of redelivery, the association stresses that its redelivery charges apply equally to all shippers so that excluding the category of residential shipments from a redelivery charge would constitute preferential treatment for the involved parties to the detriment of all other shippers and receivers. The purpose of redelivery charges is to protect carriers in instances when additional expenses are incurred as a consequence of the need to perform a service over and above that offered in normal operations. Redelivery necessitates returning the shipment to the dock for placement in a hold area which requires expensive extra handling and exposes the shipment to possible theft and damage. Also redocking tends to congest dock areas and interrupt the normal free flow of freight. Redelivery also requires additional office procedures which can be protracted and tend to disrupt the normal office routine.

On the issue of notification prior to delivery, the association states that its general tariffs do not obligate carriers to prenotify consignees but to make a reasonable effort to do so when requested. It contends that the proposed rule would construct a mandatory special prenotification provision and would prove unjustly discriminatory to other traffic. It objects to this requirement since carrier operations are generally geared to performance of delivery without prior notice. To require prenotification would interfere with the established method of operation and thereby inhibit the free flow of freight. The result would be additional and costly cross-dock handling. Also it is difficult to ascertain which shipments involve residential delivery. All in all, observance of prenotification procedures on one type of shipment would probably prove more disruptive and costly to the carrier than attempting to accommodate such shipments within its normal operations. The association contends that if it were feasible to incorporate notification procedures, the carriers would have already done so in preference to being faced with redelivery problems.

The association considers the Commission's total approach in this proceeding to be unreasonable. It considers that the proposed rule would eliminate and severely restrict the ability of carrier management to fairly price the services they are called upon to perform outside the normal course of business. It contends that this case does not present any issue with respect to lawfulness of the present tariff rules and charges nor can the carriers be said to have any burden of proof. It cautions that fair treatment of consumers does not mean that they must be given free service at the expense of others. It believes the Commission should be most careful in its consideration and should scrutinize the statements of those supporting the proposal to identify whether they contain material of substance contradicting the long experience of carriers which has lead to the present tariff provisions.

Eastern Freight Ways, Inc., operates in nine Northeastern States and the District of Columbia. Eastern believes that the crucial fact is the fundamental differences between deliveries to the average private residence and the average commercial location. It believes that prenotification is unworkable and impractical and would cause considerable expense over and above that presently required. It notes that most of the existing tariff rules provide for the performance of what would otherwise be considered inside delivery at no additional charge above the private residence charge. It believes this recognizes the fact that while only a relatively small percentage of commercial deliveries require inside handling, virtually all private residence situations do. It contends the private residence charge is not based on any one of the various differences but on a combination of all of them. It believes that on the average the receiving facilities or lack of them, and availability or unavailability of receiving personnel at dependable time during normal business hours are such that the added expenses generally occur.

Hall's Motor Transit Company is a motor common carrier of general commodities in Delaware, Maryland, New York, New Jersey, Ohio, Pennsylvania, Virginia, West Virginia, and the District of Columbia. Hall's has described 12 instances in October 1975 which it considers samp'e representations of the many problem situations which arise on shipments handled at private residences. These include determining in advance whether a private residence is involved when only a name and postal address is shown; the difficulty in finding telephone numbers with such incomplete information; the problem of locating such places; the distance from normally traveled routes; vehicle weight restrictions in such areas, low-hanging trees and wires and relative inaccessibility of the premises to carrier's vehicle; the fact that inside delivery is generally required and the private residence charge removes the application of the published inside delivery charge; and the much higher costs in general of such shipments because of their small average weight and the excessive time and mileage incurred in providing service to these locations.

Harder's Express, Inc., of Claverack, N.Y., states that its drivers and dispatchers encounter problems in arranging for and making private residence deliveries. These include improper or incomplete addresses on bills, no one at the premises to receive the shipment, difficulty in locating people especially in rural areas, low wires, weight-restricted bridges, low trees, narrow dirt roads and long curving driveways. It states that 99 times out of 100 it performs inside delivery when it arrives at a residence. Also private residences are usually located in areas away from industrial development so that trucks have to travel several miles from their daily runs and many times articles to private residences require that the driver have assistance in unloading. It believes that these problems add extra expense to this type of delivery and that the time consumed far exceeds the time compensated for in the basic rate structure.

Helm's Express, a division of Ryder Truck Lines, Inc., a motor common carrier of general and specified commodities, operates principally over a regular-route network in the States of Illinois, Indiana, Michigan, Ohio, Pennsylvania, West Virginia, Maryland, New York, New Jersey, Connecticut, Rhode Island, and Massachusetts. Helm's conducted a 1-week study of shipments delivered to or picked up at private residences, camps, schools, et cetera. It found out that 0.5 percent of the total weight of LTL shipments moving into its Pittsburgh terminal were private resident deliveries and that these shipments accounted for 2.3 percent of the total number of LTL shipments delivered. The average weight of a private residence delivery was 153 pounds while the average LTL shipment was 843 pounds. Helm's states that it is well established that the cost per hundredweight to deliver a 153-pound shipment is much greater than the cost per hundredweight to deliver an 843-pound shipment. Helm's states that the applicable tariffs do not apply on inside pickup and delivery when the private residence charge is applicable. Both rules provide for generally identical charges. It contends that most private residence deliveries require the handling of freight to a point not adjacent to the vehicle so that deliveries to private residences are accorded exactly the same treatment as an inside delivery to a normal place of business. Helm's normally provides notification of its intent to deliver freight to private residences. On the days studied it took Helm's drivers an average of 2.5 minutes per hundredweight per stop to accomplish delivery of all shipments. At the same time, deliveries to private residences took 7.6 minutes per hundredweight per stop. Although the time spent per stop on the total deliveries was 16.3 minutes compared with 11.6 minutes for private residences, Helm's contends the difference in average weight per stop (657 pounds overall v. 153 pounds at residences) accounts for the difference in minutes per hundredweight per stop. In the first 11 months of 1975, Helm's billed approximately $3,750 in private residence pickup and delivery charges. It believes these charges are not profitmaking but reimburse the carrier for the extraordinary service performed by its employees and equipment. Helm's description of the difficulties encountered include failure of the rate or billing clerk to note a residential delivery on the freight bill, low wires, narrow driveways, streets not on maps, walkways, garages behind houses, angry pets, vehicle size-or-weight restrictions on streets, potential damage to an area not designed for large vehicles, soiling of an expensively priced rug, et cetera.

The Household Goods Carriers' Bureau (HGC) which represents approximately 1,400 certificated motor carriers, urges that the household goods carriers be excluded from the scope of the proceedings and any rules that might be adopted therefrom.

The nature of the service performed by household goods carriers is that of residential pickup and deliveries of household goods. These carriers are expert in this mode of operation and have equipment designed to permit and facilitate easy residential service.

Household goods carriers make no provision, rule, item, or charge in the tariffs which singles out residential type structures or locations to assess them extra charges. The HGC states that regulations are not required to control a practice which does not exist.

In addition, household goods carriers are presently regulated to insure that the shipper, who is also the consignee, is fully aware of the delivery arrangements for his shipment. Further, these specialized carriers are prohibited by regulation from assessing any additional charges which would result from the shipment's early arrival at the destination.

In sum, the HGC states that the public is currently fully protected by regulations with respect to the operations of household goods carriers on residential and redelivered shipments.

Jones Transfer Company (Jones) of Monroe, Mich., is a general-commodity motor common carrier operating in Michigan and Ohio. Jones opposes the proposed rule contending that the costs for conducting residential service is greater than the costs involved in servicing commercial establishments. It is asserted that residential service usually involves single deliveries, which reduce driver productivity, and is conducted over narrow winding streets, which restricts the type of equipment that can be used. It is also asserted that freight which is destined to private residences is of a higher value than that which is destined to businesses and thus the risk of theft and pilferage is heightened. Jones also asserts that prenotification would be unduly burdensome and costly because it is difficult to ascertain from the bill of lading or freight bill whether the delivery is to a private residence. Similarly, the telephone numbers of the consignee are not provided on the bills and additional manpower would have to be deployed to look up the numbers and also to make long-distance calls which are not provided for by tariff. In conclusion, Jones urges that by requiring carriers to differentiate procedurally between residential and commercial traffic would in effect discriminate against the commercial traffic which would be in violation of the Interstate Commerce Act.

La Porte Transit Co. (La Porte) operates a peddle-type service within 150 miles of La Porte, Ind. Traffic is delivered mornings, gathered afternoons, and taken to the terminal for handling at night. In the first 2 weeks of November 1975, it handled approximately 3,400 shipments. Fifty-two of these required residential delivery. None of the shipments required residential pickups. La Porte performed residential delivery in 35 instances and had to render special and unusual handling to 17 of them. It considers any shipment which cannot be delivered on the next working day or which cannot be delivered in regular equipment to require special service. On residential deliveries special services include notification by telephone or letter, rehandling the freight on the carrier's dock, extra time consumed in delivering shipments in residential areas because of narrow streets, road and overhead obstructions, children playing in the streets, unloading the shipment without help or any dock facilities, waiting to collect the freight charges, scheduling drivers into a residential area for specific times and scheduling smaller equipment into an area for a residential delivery. It does not think giving notice of residential deliveries would be practical for its operations and does not believe the line-haul tariffs cover the problems faced in performing this kind of service.

LoBiondo Brothers Motor Express, Inc., is a general-commodity carrier throughout Middle Atlantic territory. It handles about 10 shipments a week to private residences. These shipments have an average weight of about 200 pounds and amount to less than 1 percent of the total shipments handled per week. LoBiondo has had various problems with consignees who expect delivery on Saturday or before 7 a.m. or after 5 p.m., who believe it is the carrier's full responsibility to unload, uncrate and place the merchandise in the most desirable position, and who get very upset at redelivery charges claiming they had never been told about them. Other difficulties include contacting the consignee at the shipper's request and taking trailers into unsuited areas.

The Local and Short Haul Carriers National Conference of the American Trucking Association, Inc. (LSHC), is a trade association the membership of which consists of short-haul motor common carriers operating under certificates of public convenience and necessity, certificates of registration or solely intrastate authority. LSHC opposes the proposed rules although the vast bulk of traffic handled by member carriers is for commercial consignees.

LSHC contends that private residence service is more difficult and time consuming and, therefore, more costly to perform than service to commercial consignees. The problems associated with residential deliveries include locating and traveling to the consignee, street weight limitations and other route restrictions, lack of loading or unloading facilities, requests for above- or below-ground delivery, vehicular speed limits, overhanging wires and branches, children playing in the street and attracted to the trucks, lack of assistance in unloading, the bulkiness of the shipment thus requiring lift-gate equipment, requests for inspection, credit, and union contracts which require extra payment to the driver for residential deliveries.

LSHC alleges that the extra costs involved in making residential deliveries must be charged to the residential consignee to avoid discriminating against the commercial consignee. It is argued that unless the additional costs are recouped from the consignee causing such costs, the carriers will be forced to spread the additional costs among all consignees. Thus, the commercial consignee would be discriminated against by having to share the costs of the residential deliveries.

LSHC opposes any prenotification requirement because it would entail so many extra man-hours that the elimination of the redelivery charge would be exceeded by the costs of notification and storage. Prenotification would also cause delays to the short-haul carriers which rely on fast delivery to be competitive.

The Mail Order Association of America (MOAA) represents most of the Nation's major catalog retailers. MOAA members have become dependent upon motor common carriers for deliveries to residential customers because of the unavailability of any other mode of transportation. MOAA states that the traditional arguments in favor of the residential delivery charges may no longer be valid and that the burden of justifying such charges rests with the carriers. MOAA further suggests that a prenotification procedure be implemented by which the carrier would notify the consignee of the date and time of delivery and thus the redelivery charge would be saved and there would be an increase in carrier operating efficiency.

The Motor Carriers Traffic Association, Inc. (MCTA), a tariff bureau located at Greensboro, N.C., submitted a statement in opposition. MCTA members are primarily motor common carriers of new furniture from points in North Carolina to points along the eastern seaboard. MCTA contends that the proposed rules would place an onerous and costly burden upon its members and in effect would prefer the residential consignee to the prejudice of the commercial consignee.

The MCTA states that there are several factors which make residential deliveries more costly than commercial deliveries. The furniture carriers' labor contracts with the Teamsters specifically provides for an extra payment of $10 for each residential delivery. In addition, some furniture carriers such as Roy Stone Transfer Corp. of Collinsville, Va., not only pay the $10 extra for each residential delivery but also must pay the driver an additional $3.25 per hour if the driver is delayed at the residence. The additional labor costs involved in making residential deliveries are not incurred in making commercial deliveries.

The furniture carriers generally have only one terminal located adjacent to the furniture manufacturing plants in North Carolina. As a consequence, deliveries to either commercial establishments or private residences must be made directly from the over-the-road equipment which consists of 50- to 55-foot-long tractor-trailer units. The large equipment must be operated through residential neighborhoods which often have narrow streets, low overhanging wires and branches, and no parking facilities. Oftentimes local ordinances have vehicle weight restrictions which effectively prohibits operation of the equipment in the neighborhood.

Deliveries are usually attempted during normal business hours which also happens to be the time when the residential consignees are at work. The problem of finding no one at home to receive delivery occurs even though efforts have been made to contact the consignee either by telephone or by mail. Redelivery must be made at a later date which adds to the expense involved.

The actual physical delivery of the freight is also more difficult at private residences. Private residences do not have loading platforms nor laborers available to help unload. Thus, carrier personnel must hand-lower the freight from the rear of the trailer and carry it into the residence. Compounding this problem is that under the bill of lading and Teamster contracts the driver is only required to make platform deliveries.

Residential deliveries also involve added claims costs to the carrier. The freight, consisting of bulky and fragile furniture is easily damaged when delivered and carried into a house by an unaided driver. Not only is the delivery hazardous to the furniture but it is also hazardous to the driver. There is also the problem of the residential consignee's unfamiliarity with claims procedures which produces added expense for the carrier.

The MCTA also objects to the requirement that delivery be scheduled for a fixed date and an approximate time on that date. Scheduled delivery dates can, at best, be only tentative because the furniture haulers have no local terminals and deliveries are made from the over-the-road equipment which often are loaded with many different shipments. However, it should be noted that many MCTA carriers presently have prenotification procedures which notify the consignee prior to the initial delivery. There is no objection to the prenotification requirement but there is objection to the requirement of scheduling delivery for a fixed date.

In conclusion MCTA urges that the Commission has recognized that discrimination based upon different circumstances is proper and that extra charges commensurate with extra service may be charged. It is stated further that it would be discriminatory to relieve the residential consignee of the extra charge because the costs which are attributable to residential deliveries must be recouped by the carrier to remain viable. If those costs cannot be recovered from the shipments which occasion the additional costs they must inevitably be spread over all traffic and thereby imposed unfairly upon the commercial consignee.

The Motor Common Carrier Bureaus consisting of the Central and Southern Motor Freight Tariff Association, Central States Motor Freight Bureau, Middle Atlantic Conference, Middlewest Motor Freight Bureau, New England Motor Rate Bureau, Pacific Inland Tariff Bureau, Rocky Mountain Motor Tariff Bureau, and the Southern Motor Carriers Rate Conference (collectively referred to as the bureaus), oppose the proposed rules. It is contended that the motor carrier tariff provisions, which provide for additional charges when shipments are picked up or delivered at private residences, are justified in view of the costly specialized services performed. It is further contended that notification prior to delivery, without charge, is contrary to the carriers' statutory and common law obligations and contrary to recent Commission decisions.

Verified statements submitted on behalf of Garrett Freightlines, Inc., Northwest Transport Service, Inc., Ringsby Truck Lines, Inc., Navajo Freight Lines, Illinois-California Express, Inc., Consolidated Freightways Corporation, IMC Freight, Inc., Pacific Motor Trucking Company, and Milne Truck Lines, Inc., support the bureaus' contention that the residential delivery charge is justified. It is stated that additional service is required to accomplish pickup or delivery at private residences, and this results in additional costs beyond those which the carriers normally incur in providing such services at business establishments.

The additional services and resulting expenses fall into two general categories: (1) the additional expense in locating and delivering to the private residence, and (2) the additional expense in effecting the pickup or delivery.

Before a delivery can be made the driver must first locate the private residence. Locating a private residence is often very time consuming because of driver unfamiliarity with the neighborhood and the infrequent nature of such shipments. Similarly, additional time and fuel is spent going from one residence to another to deliver sporadic shipments, while commercial freight usually terminates in relatively concentrated commercial areas.

The operation of large trucks through narrow streets with low overhanging utility wires and branches often causes damage to the carriers' equipment. Local ordinances oftentimes restrict carrier operations to certain streets because of vehicle weight limitations. This results in circuitous routings and added inconvenience.

Once the private residence is finally located and arrived at, it often happens that the consignee is not home. This occurs in some instances even though the carrier has given the consignee prior notice of delivery. If the consignee is home, usually only a woman or small children are present and the unloading must be performed solely by the driver. The driver is often requested to carry the freight from the vehicle to a particular room in the consignee's home. This might entail carrying the freight up several flights of stairs or down several flights to a basement.

It should be noted that several carriers, Garrett Freightlines, Inc., IML Freight, Inc., and Milne Truck Lines, Inc., give the residential consignee prior notification of delivery. The prior notification does not guarantee the consignee being home for delivery but does greatly decrease the number of redeliveries which must be made because no one was home.

A study was made by Henry V. Meyer, of the Rocky Mountain Motor Tariff Bureau, which showed the time spent by a carrier in delivering residential shipments as opposed to commercial shipments. According to witness Meyer, the study indicates that residential shipments involved a significant amount of extra time compared to the average time for all shipments and the time required for residential delivery was, on the average, more than required for all other traffic by a ratio of two to one.

The bureaus argue that residential traffic involves substantially more time to handle and deliver than does commercial traffic and that the resulting additional costs should be rightfully borne by the consignee causing such costs, i.e., the residential consignee. It is argued that residential deliveries generally exceed the Commission's own definition of a normal delivery citing, *Inside Pickup and Delivery*, 66 M.C.C. 319 (1956), and *Tennessee Carolina Transp., Inc.—Investigation*, 337 I.C.C. 542 (1970), and thus additional compensation is required to compensate for the extra services rendered.

The bureaus similarly argue that requiring notification to the residential consignee, prior to delivery, without charge, would be contrary to law and prejudicial to other consignees. They argue that the Commission does not obligate a common carrier to make special arrangements in picking up a shipment from a residential consignor or delivering a shipment to a residential consignee and that if such special service is accorded, a reasonable charge may be made therefor.

The National Industrial Traffic League (League) is a nationwide organization made up of shippers, shipper associations, boards of trade, chambers of commerce, and other organizations. The members of the League conduct commercial enterprises and are substantial users of motor common carriers. The League supports the proposed rules and contends that the present home delivery charges are not justified.

The Encyclopedia Britannica (Britannica) of Chicago, Ill., is a member of the League and has submitted a verified statement of support. Britannica ships approximately 75,000 shipments per year to private residences which must be primarily transported by motor common carriers. Britannica had relied upon REA Express for transportation services in the past but has had to rely on common carriers since the former's bankruptcy.

Britannica charges that the motor common carriers have been discouraging small shipments by performing poor service and charging exorbitant rates. Britannica suggests that it is often easier, less time consuming, and consequently less expensive to deliver residential shipments than it is to deliver commercial shipments. As an example, Britannica states that a delivery to a high rise apartment building which maintains receiving docks is easier and faster to handle than is a shipment to a business located in a congested urban area which maintains less accessible receiving docks. Similarly, it is argued that a delivery to a private residence and a store located next to one another, with the same receiving facilities, should be treated equally for rates purposes.

Britannica also urges that a residential delivery without prior notification is illogical and counterproductive. Britannica marks every bill of lading and shipping label with the home and business telephone numbers of the consignee plus an alternate delivery address. It is suggested that the effort spent in making prior notifications would be well worthwhile in view of the reduced number of redeliveries that would result.

The Ceco Corporation (Ceco) of Chicago, Ill., is also a member of the League and has submitted a supporting verified statement. Ceco produces building products for the construction industry and farm buildings for farmers. Ceco contends that a delivery to a farm, where the farmer lives and works, should not be assessed with the residential delivery charge because such a delivery is no more difficult to effectuate than any other commercial shipment. Ceco also argues that commercial operations are more likely to be performed in congested urban areas which would make such traffic more difficult to deliver than residential traffic. Lastly, Ceco urges that a prenotification procedure whereby the carrier would arrange with the consignee for a convenient delivery time, would reduce the carrier's expenses in making redeliveries.

The League submits that residential delivery charges are unlawful where they are not based upon a demonstrably greater cost and that the carriers' failure to present specific cost justification should be taken as a confession that there is no demonstrable difference. Additionally, the League urges that in the absence of a prior notification to a receiver, the assessment and collection of any redelivery charge is not justified.

The National Small Shipments Traffic Conference, Inc. (NSSTC), and the Drug and Toilet Preparation Conference (D&TPTC) represent numerous shippers who support the proposed rules. The NSSTC has 291 members of whom 22 are industry associations. The D&TPTC has a membership of 110 companies including most of the large pharmaceutical manufacturers. The members of these shipper groups use motor common carriers on traffic moving to private residences as well as to commercial establishments. The motor common carriers' services are deemed to be of the utmost importance because of the lack of other modes of transportation as a result of the demise of REA Express and the unavailability of United Parcel Service on shipments weighing over 100 pounds.

The shipper groups contends that it is unlawful for carriers to charge more, by whatever means of computation, for pickup or delivery at certain described types of premises without considering the difficulty involved in serving such locations. It is urged that for every difficulty encountered in a residential delivery there is a similar difficulty in a commercial delivery. The result of the different treatment for residential traffic is said to be prejudicial and unduly discriminatory. Discrimination is alleged to exist because prior notice is often given commercial consignees whereas no notice is usually given residential consignees. In addition, discrimination is said to exist because the residential delivery charge would not apply in a delivery to a residence from which a walk-in business was conducted while the charge would apply in a delivery to a residence from which a non-walk-in business was operated. Finally, the residential delivery charges are alleged to be exorbitant and oppressive.

It is also contended that redelivery charges are not justified in the absence of prior notification to the receiver. Such redeliveries are said to be avoidable by prenotification and that redeliveries are thus wasteful and counterproductive.

Several pharmaceutical companies including Eli Lilly and Company, Syntex Laboratories, Inc., Merrell-National Laboratories, Beecham Laboratories, and A. H. Robins Company and Ayerst Laboratories also submitted verified statements in support. These firms use motor common carriers to deliver pharmaceutical samples to the home of their sales representatives. The shipments are all prepaid and the shipper finds it objectionable when a "surprise" charge is added on for home delivery. Similarly, the shippers object to having to pay a redelivery charge when prior notice was not given in the initial tender. Oftentimes the carriers ignore instructions to notify the consignee and then tack on the redelivery charge when the consignee is not home to accept delivery.

The remaining member shippers which have also submitted verified statements, J. C. Penney Company, Fuller Brush Company, the Church of Jesus Christ of Latterday Saints, Brown & Bigelow, Boy Scouts of America, American Home Products Corporation, concur with the views expressed by the NSSTC.

North American Van Lines, Inc. (North American), of Fort Wayne, Ind., is primarily a motor common carrier of household goods. As relevant, North American's New Product Division transports new furniture, furnishings, fixtures, equipment, and appliances. North American opposes the proposed rule asserting that it is more costly to deliver to private residences and that it is only fair that the residential customer pay for the added service. North American generally uses only one driver when delivering to a commercial establishment because there is personnel available at the consignee's location to help unload the vehicle. At private residential deliveries, a driver and a helper must be dispatched so that the driver will have help in unloading. North American urges that the extra labor cost involved in residential deliveries justifies the extra charge and that such charge should be borne by the user of the extra service, i.e. the consumer. North American also warns that unless the costs involved in servicing private residences is borne by the consumer, the entire shipping public will have to pay by way of increased rates.

Northland Aluminum Products, Inc. (Northland), of Minneapolis, Minn., urges that carriers be required to give prior notification to the residential consignee, before attempting the initial delivery. Such notice could be accomplished by means of a postcard giving the consignee the essential delivery information or what alternatives are available in order to receive the shipment. Northland suggests that prior notification be performed at no additional cost because the carriers are presently sufficiently compensated on the residential traffic by means of highly compensatory LTL rates and home delivery charges.

The Office of Consumer Affairs of the Department of Health, Education, and Welfare (O.C.A.) supports the proposed rules primarily because it believes the justification for the accessorial charges is no longer proper. The O.C.A. suggests that the residential delivery charges are imposed regardless of the difficulty involved in making delivery and that it is often easier and quicker to deliver to a private residence than to a commercial establishment. The O.C.A. urges that many private residences have driveways and are located on uncongested wide streets, all of which facilitates delivery. Similarly, it is suggested that many high rise apartments and condominiums have 24-hour professional management and loading docks with receiving facilities. In contrast, it is contended that many businesses are located on congested urban streets with no receiving facilities, or are located in outlying areas which have no receiving facilities. Thus, O.C.A. concludes that it is oftentimes less time consuming and easier to effectuate a residential delivery than a commercial delivery.

The O.C.A. also asserts that the imposition of the residential delivery charge is often arbitrarily charged depending on which carrier makes the delivery. Also, some private residences from which businesses are operated are charged for a home delivery while others are not. Thus, the charge is said to be arbitrarily applied, both in the interpretations given by the carriers to the place of delivery and also whether or not to charge for the home delivery.

It is also urged that the line-haul rate includes the cost of one pickup and one delivery and the public is outraged by having to pay for an additional delivery when a shipment is delivered at home. This is said to further the belief that regulatory agencies and the regulated industries collaborate to the detriment of the public.

The O.C.A. also supports the proposed rule regarding redelivery charges. It is suggested that in lieu of a redelivery charge when no prior notification was given, the carrier should charge for prenotification and should also be entitled to liquidated damages if the residential customer is not home at the agreed-upon time. Similarly, the customer would be entitled to liquidated damages if the carrier fails to deliver at the agreed-upon time.

O.N.C. Freight Systems (O.N.C.) of Palo Alto, Calif., is a motor common carrier of general commodities authorized by the Commission to operate in eight Western States. O.N.C. has in excess of 50,000 customers including businesses, commercial operations, schools, and residences. It handles in excess of 12,000 individual shipments daily.

O.N.C. supports the additional charges for residential delivery because of the inconvenience involved in delivering to private residences. It claims that many residential streets, while admittedly less congested than city streets, prohibit the use of large trucks which results in circuitous routing and additional expenses. Oftentimes low-hanging branches and trees restrict the ability of the driver to park conveniently and many apartment houses do not have room to park. Drivers must also make special arrangements to cart the freight over unpaved sidewalks and driveways, and must also exercise special care when driving through residential areas because of children playing.

O.N.C. also claims that the personal contract with the home dweller justifies the additional charges. The freight that is oftentimes delivered to private residences consists of appliances, large pieces of furniture, or other expensive items. The home dweller will often require that the freight be unpacked so that it can be properly inspected, which is time consuming and expensive. The drivers might also be requested to remove doors or use planks in order to bring the freight into the home. In addition, many people do not have the cash or a certified check needed to pay for c.o.d. shipments which thus requires a redelivery.

O.N.C. terminal managers take the precaution in telephoning the receivers of the freight prior to the initial delivery but there are still problems involved. If the freight bill does not have the receiver's telephone number, the number must be looked up. If the telephone number is unlisted, no telephone contact can be made and many telephone calls must be made if both husband and wife work. It often results that after telephone contact is made the parties request delivery before 8 a.m. or after 5 p.m. which does not fit in with the drivers' regular routes.

O.N.C. insists that these problems do not arise in commercial deliveries and thus the additional charge for home delivery is justified. O.N.C. did not submit any cost evidence showing the additional cost involved in delivering to private homes as opposed to businesses.

The Outboard Marine Corporation (Outboard) of Waukegan, Ill., urges adoption of the proposed rules contending that the existing residential accessorial charges are unjust, unreasonable, and discriminatory.

Outboard argues that residential delivery charges apply without regard to whether or not any unusual costs are actually incurred by carriers in providing pickup or delivery service to those locations where the charge is applicable. It suggests that the carriers have acted arbitrarily in establishing residential accessorial charges at levels that are entirely without cost justification. It thus alleges that the arbitrary level at which the accessorial charges have been set violates section 216(d) of the act and should be considered unjust and unreasonable. Additionally, it contends that such residential charges discriminate against the residential consignee and thus violate the prohibition against preferring one person, locality, or region over another.

In sum, Outboard contends that without specific cost evidence to support the residential accessorial charges, the Commission should find such charges to be in violation of sections 216(b) and (d) of the act.

Rooks Transfer Lines, Inc. (Rooks), of Holland, Mich., is a short-haul motor common carrier of general commodities. Rooks opposes the proposed rule, alleging that the residential delivery charge is necessary in order to compensate the carrier for the extra work involved in handling residential shipments. Rooks opposes the proposed rules although residential traffic constitutes only a minute portion of the total traffic handled.

Rooks contends that as a short-haul carrier it must depend on an expedited service to remain competitive. It is suggested that residential traffic slows down carrier operations both in the handling of such shipments on the dock and in the actual delivery to the residence. Rooks segregates the residential traffic from the commercial traffic on its receiving platform and then telephones the consignee to arrange a convenient delivery time. Extra time and effort is also spent in locating the residence, traveling through narrow residential streets with overhanging physical obstructions and playing children, physically unloading the freight while unassisted and bringing it into the residence, and waiting to receive the cash on collect shipments. Rooks urges that the above-named extra services require additional time and effort to perform, which is not spent in handling commerical traffic and should properly be compensated for by means of a residential delivery charge.

Ryder Truck Lines, Inc. (Ryder), of Jacksonville, Fla., a general-commodity motor common carrier, filed a verified statement in opposition. Ryder contends that residential service requires the performance of time-consuming and costly services which are above and beyond the costs involved in delivering commerical freight. Ryder warns that unless it is able to charge for the extra services rendered in residential deliveries, the movement of commerical freight will deteriorate, become expensive, and private carriage will be increased.

Ryder believes that the rule of reason applies and that it may assess additional charges for any service which is over and above that required in the provision of the usual services covered by its normal rates and charges. Ryder cites *Restrictions on Service by Motor Common Carriers*, 119 M.C.C. 691 (1974), in support of the contention that extra services can lawfully be compensated for.

Ryder suggests that if general-commodity motor common carriers are obligated to transport residential deliveries at no additional charge, many retailers and sales agents will change their methods of doing business and will commence selling consumer goods from floor samples and will order delivery to be made by the line-haul carrier. Furthermore, the seller would be encouraged to do so because no charge for home delivery would be made in addition to the charge which would apply for delivery to the seller's store or warehouse.

It also contends that residential shipments of less than 500 pounds are already being handled at the maximum level of efficiency and it still develops deficits which must be offset by carrier earnings on other traffic.

In sum, Ryder is willing to provide residential service for which it believes it must be compensated for by means of a home delivery charge. In addition, Ryder is agreeable to giving the residential consignee notice prior to delivery as a possible solution to the problem.

Select Service & Supply Co., Inc. (Select Service), is a distributor and broker of camp equipment and supplies with annual sales of some $2 million and customers in all 50 States. It contends that there are two types of camps: One is the recreational type open from June through August, the other is the year-round camp or conference center which has a full-time staff and program. A selection of 39 freight bills covering camp deliveries in June 1976 reveals that 7 had a camp delivery charge and that these charges varied from 5.6 percent to 40 percent of the total freight bill. Select Service contends that camps complain to them that the extra delivery charge is improper because camps are a business no different than a hardware store, grocery store, or hospital and that the charges are being arbitrarily applied. It contends that deliveries to its office upstairs in an office complex are more difficult to accomplish than to some camps. Directions to the camp locations are clearly posted, the roads are usually in better condition than roads within local communities, and camp personnel are available to accept deliveries.

S. Gumpert Co., Inc. (Gumpert), of Jersey City, N.J., manufactures and distributes food products to various customers including schools and camps. Gumpert supports the proposed rule particularly insofar as it relates to schools and camps. Gumpert states that deliveries to schools and camps should be considered the same as deliveries to commercial establishments because there is no additional work involved in making such deliveries. A study was submitted showing the amount of time spent by various carriers in unloading at several schools. The study shows 16 shipments which took between 10 and 210 minutes to unload. With the exception of one shipment, which took 3 1/2 hours, the average unloading time was 32 minutes.

Southern Furniture Manufacturers Association (SFMA) of High Point, N.C., is a voluntary nonprofit association consisting of approximately 200 southern furniture manufacturers. SFMA does not contend that the residential delivery charges are unreasonable per se but does urge that the wording of several such tariffs is unclear and that the carriers have interpreted the language to their unlawful advantage. More specifically, the words "and other places not maintaining shipping or receiving facilities and personnel during business hours shall be assessed ***," found in paragraph (k), item No. 154, MCTA Tariff 2-T, paragraph (b), item 125, Tariff 8-0, and paragraph (2), item 330, Tariff 523-M, are unclear and, therefore, violative of section 217(b) of the Interstate Commerce Act.

SFMA members ship a substantial amount of furniture to hotels, motels, schools, apartment houses under construction, and housing developments under construction. The shipments which are destined to the above-mentioned customers are often volume shipments and are charged the accessorial home delivery charges. SFMA urges that the home delivery charge should not be applicable to such shipments because the stated destinations should be considered as commercial establishments for rate purposes and not private residential units or any other unit for which the home-delivery charge is charged. SFMA members have been charged the home-delivery charge on several such shipments and have complained to the carrier who responded by citing the provision of the tariff being questioned by SFMA.

The Southern Motor Carriers Rate Conference, Inc., submitted a supplementary statement in opposition consisting of the verified statements of Colonial Motor Freight Lines, Inc. (Colonial), Florida Terminals & Trucking Company (Florida), and Robert L. Steed of the Southern Motor Carriers Rate Conference. The carriers as well as the conference argue that the residential pickup and delivery charges are necessary to recoup the additional costs in handling shipments to these locations.

Florida alleges that the residential delivery surcharge is necessary so that residential service can be economically performed. It is also urged that the proposed rule regarding prenotification and delivery by appointment would be unworkable as well as too expensive. Such a procedure would require the hiring of an additional clerk to arrange appointments and the paying of expensive telephone bills. Florida's operations also involve the use of long peddle operations of several hundred miles which would make it difficult to accurately schedule a convenient delivery time. Florida's terminal facilities are designed for expedited freight handling and rarely is freight segregated based on the nature of the consignee. The prenotification procedure would allegedly slow the freight handling procedures to the detriment of all consignees.

Colonial is a common carrier transporting general commodities including new furniture from North Carolina to points in several Eastern States. The furniture traffic constitutes 40 percent of Colonial's gross revenue and is the traffic which Colonial fears will be harmed by the proposed rules. Colonial alleges that residential service is considerably more expensive to render than is a commercial service. Colonial cites driver difficulty in locating the residence, physical obstructions such as low-hanging wires in residential neighborhoods which obstruct carrier equipment, local ordinances respecting the maximum vehicle weights allowed, and extra work in unloading the freight, as factors which increase the services rendered for the residential consignee. In addition, the residential consignee usually does not assist in unloading and the carrier is expected to uncrate the furniture and set it up. Colonial also experiences higher rates of damage when delivering to private residences because the carrier's liability to the residential consignee is based on the retail cost whereas the carrier's liability to the commercial consignee is based on the wholesale cost. Colonial also attempts to notify residential consignees by telephone prior to delivery to make sure someone will be home to accept delivery.

Robert L. Steed submitted a study showing the amount of time spent, and number of deliveries tendered, to a private residence as opposed to a business establishment. The study shows that the average number of shipments at a residential stop is 1.0 whereas it is 1.25 at all other stops. The number of running minutes for stops at private residences on a stop basis exceeds the requirements at all other stops by from 50 percent for pickups to 21 percent for deliveries. The number of running and stop minutes for stops at residences on a shipment basis exceeds the requirements on other shipments by from 90 percent for pickups to 55 percent for deliveries. The minutes, running and at stop, in terms of hundredweight handled at the residential stop is up to eight times that as at commercial stops. No study was made on the amount of time spent by clerical personnel on arranging for convenient delivery times.

In sum, it is contended that residential pickup and delivery charges are necessary to recoup the additional costs inherent in handling shipments to these locations. It is also urged that the commercial traffic should not be required to subsidize the residential.

Stanley Trucking Co., Inc. (Stanley), of Pawtucket, R.I., is a local carrier specializing in delivering small interline shipments throughout Rhode Island. Stanley believes that the residential delivery charge is justified because of the inconvenience involved in serving the residential customer. Stanley asserts that its drivers are familiar with commercial and industrial areas but are not familiar with residential neighborhoods and, therefore, additional time must be spent in locating the residential delivery points. In delivering to commercial establishments there are generally receiving facilities and shipping clerks available to help unload the vehicles whereas private residences do not have receiving facilities nor do they generally have shipping personnel to assist in the unloading. Drivers also must be careful when delivering to private residences because of unfriendly dogs in the yards and also because care must be taken to avoid breaking household furnishings when delivering inside the home. When shipments move c.o.d. to private homes oftentimes the receiver does not have the necessary funds available and redelivery must be attempted at a later date. On the other hand, commercial establishments usually have established credit and shipments are not often returned because of lack of payment. Stanley also asserts that it is more difficult to operate through narrow residential streets where there is always the danger presented by children playing and where low-lying branches and wires interfer with the vehicles. Stanley also expressed the concern that if the residential delivery charge were to be abolished no carrier, including itself, would wish to handle this type of traffic.

Sternberger Motor Corporation (Sternberger) is a motor common carrier of primarily crated and uncrated office and household furnishings, operating between numerous points along the eastern seaboard. Sternberger submits that the services and the resulting costs involved in making inside residential and office deliveries justifies the additional home delivery charges currently imposed. A study was submitted depicting traffic handled during a 1-week period in November 1975, showing that approximately 70 percent of all traffic handled involved inside deliveries for which an accessorial charge was made. A comparison of the work involved in making a commercial dock delivery and the work involved in making a residential or office inside delivery was made to demonstrate the additional work that must be spent on residential and office inside deliveries. The following activities are performed in effectuating a commercial dock delivery: one driver is dispatched per truck; no notification is made to the consignee prior to delivery; the shipments are dispatched for delivery as soon as received and in some instances are not even unloaded from the pickup vehicle but are dispatched on the same vehicle which obviates the necessity of any terminal handling; the consignee is generally located on a main street with which the driver is familiar; the consignee accepts delivery of the shipment on his receiving dock or platform or at the tailgate of the truck within normal business hours; the driver does not have to unwrap the freight; on collect shipments it is not necessary for the driver to wait to get paid because the consignee usually has a charge account with the carrier; and if the truck arrives after closing time the carrier does not charge a redelivery charge. The following activities are performed in a residential or office inside delivery: all shipments must be unloaded from the pickup or line-haul vehicle; the consignee is telephoned to arrange for a delivery date which involves employing part-time clerks to make the telephone calls during evening hours; redelivery charges are charged only if the consignee fails to be at home after being notified, no redelivery charge is imposed if the consignee is not notified of the delivery; trucks are dispatched with a driver and a helper; drivers often have difficulty locating private residences; the roads are often too narrow to accommodate large trucks; the driver and helper must carry the freight from roadway to doorway; in congested urban areas trucks are only permitted to park during certain hours of the day; there are often long waits for elevators in apartment buildings, and the drivers and helpers often must carry the freight up five flights of stairs; doors and windows might be removed to effect delivery; the freight might be carried down to a basement or up to an attic; the freight is generally held at the terminal for an average of 1 week; the freight is unwrapped by the carrier personnel; furniture is often assembled by the carrier personnel; paper is often spread on the consignee's floors to avoid tracking in dirt from outside; carrier personnel must be appropriately dressed and mannered to enter private residences; carrier personnel must also await payment on collect shipments; and furniture delivered to a private residence is said to be more valuable to the consignee than is freight which is delivered to a commercial consignee. Sternberger warns that unless the home-delivery charge can be imposed, carriers such as itself would not desire to handle such traffic. This would result in the furniture traffic being moved by household goods movers at an added cost to the consignee.

The Traffic Managers Conference of California (conference) is a nonprofit corporation comprised of 125 manufacturing distributing and shipping firms located throughout California. Conference members ship their products throughout the United States, to both commercial establishments and private residences, primarily by motor common carriers. The conference supports the proposed rules because it believes the present residential delivery surcharge to be ambiguous and discriminatory and also because carriers are presently compensated for extra services performed and thus there is no need for an additional charge for residential delivery.

The conference contends that it is important to be able to determine, before a shipment is made, what charges should apply. It is pointed out that tariffs provide for transportation services between named points, and that unless specific addresses or other localities within the named points are set forth in the tariffs, the tariffs lack clarity. Accordingly, the shipper cannot determine at the time of shipment exactly what the charges will be.

The conference also contends that the residential delivery charge is unnecessary because of other tariff provisions which compensate the carrier for every cost-producing contingency. The compensating provisions in the tariffs published by the Rocky Mountain Motor Tariff Bureau provide for detention charges, redelivery charges, extra labor charges for unloading at request of the consignor or consignee, and charges for deliveries beyond the limits specified in the tariff.

The conference also contends that many businesses are moving into traditionally residential areas and there is no rational basis for charging a private residence more than a business when they are located in close proximity to one another. Further, it is contended that the burden is upon the carriers to cost-justify the residential delivery charge.

Treadway's Express, Inc. (Treadway), is a common carrier with operating authority in New Jersey and parts of lower New York State. During the summer months between 15 and 20 percent of its traffic consists of shipments to private residences, country clubs, and camps. In the winter months, the percentage decreases to 10 to 15 percent. The difficulties enountered on this type of shipment begins with the lack of information on the bill of lading. Treadway says it receives claims for damaged driveways, shrubbery, fences, the sides of houses, which have occurred during a residential shipment every week. Consignees almost always complain about having to pay the residential delivery charge since the shipper did not inform him that such would be due. Because of the volume of shipments processed each night, it would be both impractical and impossible for Treadway to give notice to receivers of residential shipments. If residential delivery charges are canceled, deliveries will be noncompensatory and the burden will have to be made up on other traffic through yet another increase of rates and charges.

Smith Brothers Express, Inc., offers service from New York City, Brooklyn, Long Island City, Bayonne and Jersey City, N.J., to all points on Staten Island. Private residences make up about 25 percent of its deliveries. Its problems include nonworking doorbells, women taking baths, loud vacuums, notes to make delivery to some other house, and tree-lined streets. Unlisted phones are another big problem, as is lack of cash on the part of receiver. Camps and country clubs usually mean long walks up steps or downstairs into the basement. In man-hours, Smith believes it takes twice as long to make a residential delivery plus aggravation to the driver. It is impossible to notify consignees until the freight is ready for delivery and then it is almost impossible to fit delivery into the time when the receivers would like to receive it.

United Parcel Service, Inc. (New York and Ohio), (UPS), oppose any rule requiring agreement between the parties before delivery or redelivery is attempted to a residence or related type premises. It does not oppose the prohibition against additional charges for deliveries to such places.

UPS provides a highly specialized type of parcel delivery service, competing with the U.S. parcel post service. It delivers in excess of 3 1/2 million packages every business day. The great majority of these are delivered on the first attempt and a substantial percentage go to private residence, apartments, churches, schools, camps, and other related types of premises. It is UPS' practice to make two additional attempts at delivery after the first attempt. If it is unable to complete a delivery after three attempts, it returns the package to the consignor without additional charge. At each delivery attempt, UPS leaves a "Delivery Notice" explaining that the delivery was attempted, the date on which redelivery would be attempted, and giving the telephone number to call should the stated redelivery date not be satisfactory.

Wilson Trucking Corporation operates as a common carrier of general commodities in Virginia, Maryland, and the District of Columbia. It cites many difficulties which it believes cause additional expense in making residential and similar types deliveries. Primarily these result in the expenditure of more time on these deliveries than is required in delivering to commercial establishments since the latter are accustomed to receiving freight, have proper shipping and receiving facilities and are easily located. It is the loss of time which causes residential deliveries to be more expensive and that justifies the assessment of additional charges. While prenotification to consignees would undoubtedly alleviate the problem of finding no one at home to receive the shipment, it is practically impossible while the shipment is en route and later would require rehandling and use of the carrier's platform as warehouse space which would be costly. Loss of the residential delivery charge would be subsidization of residential traffic which would be prejudicial to other types of traffic.

Wooleyhan Transport Company (Wooleyhan) operates primarily between New York City and Washington, D.C., with radial authority at New York, Philadelphia, Wilmington, Baltimore, and Washington. During December 1975, its Philadelphia and Wilmington terminals handled 33 residential shipments. It characterizes the unusual cost associated with residential shipments as including the driver's difficulty in finding private homes, instances where shipments are returned to the terminal, and the office help involved in calling the consignees. It says that the extra costs involved are often higher than the $8.86 residential charge for minimum shipments contained in the Middle Atlantic Conference tariffs. It admits that some of these shipments can be handled in a normal manner but even then residential areas have narrow streets or lanes, projecting tree limbs, overhead lights, no truck access signs, and the driver usually has to park away from the home. Wooleyhan has found it necessary in most instances to instruct its operating people to separate this traffic entirely from normal traffic and proceed through a routine of obtaining a definite period when the consignee will be at home and establishing whether the vehicle can be moved into the driveway and whether there will be somebody available to assist the driver. It considers the results of its study showing 33 shipments out of approximately 10,000 as indicating that the problem is not a huge one. However, it does not think that residential traffic should be subsidized to the detriment of traffic having shipping and receiving facilities since the rates were established generally for such type of handling.

REPLY STATEMENTS

The Motor Carriers Traffic Association, Inc., contends that no evidence has been presented which would rebut the factual showing which it made on behalf of its members. It points to the Bureau of Investigations and Enforcement's (Bureau) comments that most of the public complaints are about redelivery charges when no prior notice has been given while its members make every effort to provide the consignee with advance notice of delivery. The bill of lading used requests both home and office telephone numbers for residential consignees and the drivers attempt contact before effecting delivery. It believes that it has satisfied the Office of Consumer Affairs' request for "concrete cost data" since its initial statement has showed that residential deliveries are more time consuming, that union contracts of over-the-road furniture drivers provide for additional payments for residential deliveries, and that handling bulky items sometimes requires the use of local labor. It criticizes the initial statement submitted by the Southern Furniture Manufactures Association for attempting to broaden this proceeding to include issues which are outside those covered in the Commission's notice. It believes the evidence does not justify adoption of the proposed rules with the exception of the already established practices of its member carriers of undertaking delivery arrangements insofar as possible in advance of delivery.

In the view of the Commission's Bureau the initial presentations show that the abolishment of the residential pickup and delivery charges would not cause any great revenue loss to the carriers but would have substantial beneficial impact on shipper and consumer interests. The Bureau believes that the cessation of service by REA Express, Inc., limits the options available to shippers and receivers so that the Commission should abolish residential pickup and delivery charges because they serve as one impediment to the public's use of motor common carriers. The Bureau comments on the lack of uniform motor carrier practices on giving notice of a pending residential delivery as disclosed in the initial statements. It suggests modifying the proposed rules so that notice applies uniformly to all receivers of freight. It also suggests making notice permissive on all deliveries, coupled with a restriction against assessment of a redelivery charge by a carrier who chooses not to prearrange delivery. These modifications would eliminate the confusion which seems to occur about the terms private residence and open to the walk-in public.

The Eastern Central Motor Carriers Association, Inc., reaffirms its position that in this rulemaking proceeding the respondent motor carriers have no burden of proof and the lawfulness of present tariff rules and charges is not at issue. It notes that a general-commodity carrier's business is approximately 99 percent commercial and as a consequence its ratemaking considerations reflect the characteristics of commercial service, equipment and operating procedures have been tailored to the normal tailgate service and additional services such as inside delivery (often requested on residential shipments) have not been considered in establishing the rate level. It believes that it has documented the more troublesome and costly areas of serving residential deliveries which include requests for inside deliveries, absence of personnel on the premises to permit completion of the transaction, lack of help to physically accomplish delivery, narrow residential streets, low overhanging wires, address not readily visible, narrow driveways, et cetera. It characterized its activities as being in determined pursuit of an equitable small shipment rate structure, which means that to the extent possible, costs should be allocated to the category of traffic responsible for their incurrence. The possibility that an individual residential shipment may be delivered relatively free of problems in no way justifies condemnation of the general application of additional charges for residential service as a category or class of traffic.

On the issue of a notice of attempted delivery, Eastern Central's position is that to make it mandatory on residential traffic would not only be discriminatory, but would require many additional, costly procedures and would disrupt normal operations. It believes that the evidence in support of adoption of the rules falls short of that necessary to condemn the present tariff publications but that the submissions of over 50 motor carriers have substantiated the need for these tariff items through testimony based on vast experience. It believes that additional unavoidable costs are incurred in performing this service and that these costs have not been taken into consideration previously in formulating rates.

The Mail Order Association of America urges that residential delivery charges be permitted only on data substantiating their justness and reasonableness. It is its position that the public would be better served by requiring carriers to recover all costs from standard tariff charges applicable to all shippers and consignees. It is critical of the carriers' definition or lack of definition of residential delivery. Most of the carrier evidence concerns deliveries to single-family dwellings, however, it is clear that deliveries to other types of locations have also incurred the additional charges. It believes that the initial statements show the carriers have already implemented the spirit of the prenotification rule.

The Motor Common Carrier Tariff Bureaus[1] (bureaus) believe that the motor carriers have made a good faith attempt in the limited time frame involved to specify the various problems and costs incurred in making residential deliveries. The bureaus believe that the numerous verified statements of carrier operating personnel describe the problems, that the verified statement of Mr. Meyer showed conclusively that additional stop and running time is involved for residential deliveries as compared with Commission data for all pickups and deliveries, and that the cost for mandatory notification prior to delivery would add significantly to the cost in performing such service. The bureaus take issue with the verified statement of Mr. Brooks on behalf of Ayerst Laboratories Division of American Home Products Corporation and the characterization by the National Small Shipments Traffic Conference and the Drug and Toilet Preparation Traffic Conference that this company among others depends heavily on motor carriers.[2] They point to the bankruptcy of REA to say there is no merit in using REA as an example of a company that performs service without charging for residential deliveries. They distinguish the procedures followed by United Parcel Service inasmuch as that carrier is geared to perform this type of service. They reiterate their position that residential charges are based on additional difficulties and costs incurred in making the average residential delivery. The fact that some residences may be as easy to serve as some commercial establishments in no way alters the relative difficulties and costs incurred on the vast majority of residential shipments. They believe that the data submitted by motor carriers show that the example of a high rise apartment with a receiving dock and qualified personnel to assist in unloading is an aberration. They stress that there is no burden of proof on the motor carriers in this rulemaking proceeding to cost-justify presently effective provisions. They cite *Phosphate Export Assn. v. Atlantic Coast Line R. Co.*, 243 I.C.C. 525, and *Seattle Traffic Assn. v. Consolidated Freightways, Inc.*, 301 I.C.C. 383, for the proposition that there is a presumption that long-maintained rates and charges are just and reasonable and not unduly prejudicial or preferential. They believe that the real issue in this proceeding is whether there are generally significant differences in providing pickup or delivery services to commercial vis-a-vis residential-type premises which justify the application of specific rates or charges on movements to or from the latter. They believe the evidence on this point is conclusive in their favor. They believe the only way more meaningful and statistically representative cost data can be obtained is by the Commission's requiring specific identification of residential shipments to be incorporated into Form 4 of Highway Form A and for a 1-year data collection of the revised form. They would have the Commission conduct additional tests in conjunction with its forthcoming platform study on the cost of prenotification and handling of residential shipments.

On the issue of redelivery charges, the bureaus believe that the charges are justified since they are assessed only when through no fault of the carrier delivery cannot be accomplished on the first attempt and that elimination of redelivery charges for one group of consignees (residential) would be at the expense of the other group of consignees (commercial).

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[1] Central and Southern Motor Freight Tariff Association, Central States Motor Freight Bureau, Middle Atlantic Conference, Middlewest Motor Freight Bureau, New England Motor Rate Bureau, Pacific Inland Tariff Bureau, Rocky Mountain Motor Tariff Bureau, and Southern Motor Carriers Rate Conference.

[2] Mr. Brooks' verified statement indicated that his company shipped 2,940 out of 647,700 shipments annually to private residences.

The New Hampshire Camp Directors' Assn., Inc., supports the position of the American Camping Assn. It believes the youth camps it operates are commercial businesses much like resorts, boarding schools, colleges, and hotels. Many have unloading areas and are located no further from town centers than industrial parks or resorts which do not pay extra charges.

Outboard Marine Corporation is critical of the carriers for describing all residential deliveries as difficult and almost all commercial deliveries as performed under near ideal conditions. It points out that certain types of businesses such as construction sites, automotive service stations, and retail stores lack unloading facilities that the carriers say are so important. It contends that the carriers have unilaterally decided that dock-to-dock service is what they hold themselves out to perform. It believes that commercial businesses would not abide charges based on the actual existence of the loading/unloading facilities which the carriers say are so important. It is critical of the cost studies of Messrs. Meyer and Steed claiming: (1) That they consist of the study carriers and the study time is unexplained and unreasonable, (2) there is no way to check accuracy of running time computations, and (3) the appendix I to Mr. Steed's statement shows only 3.3 more minutes for residential stops than commercial stops. Outboard sees most of the extra services mentioned as the reasons for residential pickup and deliveries as being covered by other separate charges which depend on actual performance. Outboard sees no justification in the motor carriers' argument that they do not have suitable equipment for providing efficient, economical pickup or delivery service to nonbusiness locations. It claims that the carriers must bear the consequences if they have only purchased equipment which can be utilized in serving just one segment of the general public. It believes that some, if not many, commercial locations require this same equipment which the motor carriers say they do not have. Outboard is critical of the so called "cost studies" because they fail to adhere to the standards set by the Commission. In any event, these representations indicate that less than 2 percent of the traffic studied was picked up from or delivered to nonbusiness locations so that the impact upon motor carrier revenues resulting from the abolition of residential delivery charges would be negligible. In regard to the carriers argument against the notification requirement, Outboard points out that prior notification is a service currently provided to consignees by most common carriers at no additional charge. Also, it contends that no charge for notification of the consignee prior to delivery which has been subject to an investigation and suspension proceeding has survived, including the cases cited by the motor carriers in this proceeding. In summation, Outboard believes that the motor carriers have failed to show that the charges now in effect are just and reasonable. They have been shown to be discriminatory, unduly preferential to commercial shippers and receivers, unreasonably prejudicial to shippers and receivers at nonbusiness locations, and not reasonably commensurate with the additional cost of any services required as the result of the nature of the shipment. It contends that cost data is in the possesion of the motor carriers but they failed to use it. Even if the data submitted were accepted, it shows the expense alleged to be encountered is so small as to be de minimis.

The Southern Furniture Manufacturers Association (S.F.M.A.) questions the statement by the Motor Carriers Traffic Association that the proposed rule would place an onerous and costly burden upon the carriers, particularly the carriers of new furniture. It knows no reason why furniture should be treated for special charges as contrasted with other commodities. It does not accept as justification the fact that motor carriers specializing in furniture agreed to labor conditions which provide extra compensation for "house" deliveries. As to the reference by the Motor Carrier Traffic

Association to a phone number on the bill of lading. S.F.M.A. knows of no such bill-of-lading provision. It takes issue with the Motor Carriers Traffic Association's statement that the driver is required only to make a platform delivery pointing to a tariff provision which refers to platform, doorway, or other location directly accessible. It is critical of the "loose manner in which motor carriers speak about loading and unloading facilities at commercial establishments" since it believes that many commercial establishments take deliveries at the curb or sidewalk. S.F.M.A. takes no position on the imposition of charges pertaining to bona fide residential deliveries as it has not data to offer. It is concerned with the ambiguity in the various tariffs, and requests that the Commission order motor common carriers to spell out precisely what constitutes "residential delivery" and to require that charges be based on the service rendered and not on the designation given to the building.

The National Industrial Traffic League (League) submits that the motor common carriers failed to establish that (1) the pickup and delivery at a private residence is "a specialized service"; (2) it incurs distinctly different costs than incurred on other traffic; (3) that whatever costs are incurred on private residence pickup and delivery they are not already included in cost assigned by the weight brakcet and the determination of overall cost-revenue comparisons by weight bracket related to revenue needs; (4) that whatever differences there may be in pickup and delivery at private residences they are not in any way shown to relate to or support the magnitude of the additional charges being assessed. It is the League's position that as a matter of fact the cost-revenue comparisons which the various regional bureaus submit in general increases by territories and by weight bracket already include an application of all the costs related to the time and effort involved in picking up and delivering at private residences, apartments, churches, schools, camps, or other noncommercial locations. All the difficulties, time, expense, et cetera, that have been described by individual carrier witnesses are all taken into consideration in these regional studies. Residential charges are, therefore, additional charges over and above the allocation of expenses incurred in providing average pickup and delivery services, including services at private residences.

The League questions the validity of the cost evidence of witness Meyer since it does not give the average number of shipments per stop yet it is this fact which accounts for the difference in man-minutes per stop. Significant economies result based on the number of shipments being picked up or delivered and not because of the particular characterization of the location involved. According to the League, at most, Mr. Meyer has demonstrated that the average minutes per shipment on shipments weighing 0-399 pounds is 9.19 minutes at the stop compared to 5.71 minutes in Rocky Mountain region and 5.32 minutes in Pacific region. The *maximum* differential is less than 3.5 minutes per shipment at the stop and 3.5 minutes is only 5.8 percent of 1 hour. If the total cost per hour of a man and the vehicle is $10, the additional man-minutes at the stop allegedly related to residential deliveries would justify a charge of only 58 cents. If the average cost for a man and a vehicle is $15, the total charge for residential delivery related to the man-minutes at the stop would only be 87 cents. Because of the fact that these overall expenses are already covered in the allocation by weight brackets, and the extent to which residential deliveries occur with more frequency in the smaller weight brackets is already reflected in the total cost of service, it submits that these differentials are de minimis. They do not justify the plus charge.

As to the running minutes per shipment, Mr. Meyer's special "survey of residential delivery statistics" developed 13.68 running minutes per shipment. This is compared with the regional running minutes per shipment of 4.64 in Rocky Mountain and 6.02 in Pacific region. The League notes the great distances involved in the Rocky Mountain and Pacific regions so that it thinks these times would overstate the experience for other regions. In any event, the difference between the regional studies and the carrier survey develops a difference of 7.66-9.04 running minutes per shipment between the alleged "residential delivery" and the regional averages. Again, these differences in relationship to the total cost of service as already allocated among weight brackets, are de minimis and do not justify the residential charges.

The total difference in minutes per shipment between Mr. Meyer's summary for residential deliveries and the regional studies show a maximum different of 10.5 to 12.5 minutes per shipment. The League suggests that this is a de minimis difference not justifying the assessment of a different charge, particularly since (1) the total expenses are already allocated among all weight brackets and reflected in cost revenue comparisons, and (2) the difference in minutes per shipment is more reflective of the difference between possible single shipments versus multiple-shipment pickup and delivery. In any event, these differences are not shown to justify the substantial applicable charges assessed for residential pickup and delivery.

The League contends further that since detention rules cover the amount of free time at the stop, using the time required to accomplish a residential delivery as justification for an extra charge is double counting the same service and even triple counting when you consider that delivery is included in the line-haul rate.

The National Small Shipments Traffic Conference, Inc., and Drug and Toilet Preparation Traffic Conference (conferences) suggest that shipments requiring prenotification should (1) be prepaid, (2) that the consignee's telephone number be required on the bill of lading where prenotification is to be by phone, (3) that the carrier be required to leave a notice of extra charge information in the event the consignee elects to refuse to accept delivery, and (4) allow prenotification to be optional with the carrier where extra charges are not to be assessed for redelivery and storage. The conferences believe that the election of the carriers to use rhetoric rather than facts is indicative that cost data available supports the proposed rules. They refer to a study made by Ohio State University for the Department of Transportation, Report No. RF-3491 TR-1, which mentions that vehicles operating in the central business district spend 25 percent of their time in transit, 40 percent unloading, 8 percent loading and almost 30 percent "queing" time. They believe it unlikely that residential pickups and deliveries cause delays of this magnitude. They characterize the "Meyer" study as inappropriate in that it compares the time for residential deliveries with the Commission's average pickup or delivery time for all shipments, including multiple-shipment pickups and deliveries. They also characterize the motor carriers assumption that extra costs are incurred because residential shipments must be held until delivery arrangements are made as improper. This assumption indicates that normally shipments moved directly from the inbound vehicle to the outbound vehicle. However in an ICC Bureau of Accounts publication, "Motor Carrier Platform Study" (ICC Statement 2 S 51-70, June 1973), indicates that "freight is more frequently moved out of a vehicle and positioned to a point on the platform from which it is later moved into another vehicle." This study found that 70 percent of all shipments involved truck-to-platform/platform-to-truck movements.

In summary, the conferences believe that actual costs incurred on LTL traffic is alike, proportionately there are as many good and bad residence pickups and deliveries as there are on commercial deliveries, and the nature of the location is not controling.

In reply to the petition to intervene by the American Camping Association with accompanying verified statements, the New England Motor Rate Bureau, Inc. (New

England), contends that even with camp arbitraries, service results in a deficit operation because camps are located far from commercial locations, often on dirt roads and it takes time to locate them and to find someone to accept the shipment. It contends that missing from this presentation are the views of those best able to refute the justification of the charge, camp operators who are familiar with receiving shipments.

BRIEFS

American Retail Federation submits that the essential question in this proceeding is whether it is lawful and in the public interest to allow carriers to charge more for pickups or deliveries at residences based solely on their nature without apparent regard for the relative difficulty involved in such services. It believes the record indicates a lack of carrier justification for the charges at issue. It disagrees with the carrier representation on the meaning of the Commission's report in Ex Parte No. MC-77 (Sub-No. 1) *Restrictions on Service by Motor Common Carriers*, 119 M.C.C. 691. It believes that this case approves additional residential charges only when they are in fact shown to be just, reasonable and otherwise lawful and to be such there must be some relationship between the cost of providing the service and existing rates and charges. It does not think that general statements about "narrow streets," "overhanging trees," "poor street signs," "low wires," and "children in the street" should be accepted any longer. It cites *Pickup and Delivery Charges at Ky. and W. Va. Points*, 64 M.C.C. 199 (1955), for the proposition that extraordinary pickup or delivery charges which would apply only on LTL and any quantity shipments may not be approved in the absence of compelling reasons.

The Commonwealth of Pennsylvania supports the proposed rules as modified by the Commission's Bureau.

The National Small Shipments Traffic Conference, Inc., and Drug and Toilet Preparation Traffic Conference (conferences) contend that once the Commission established that a question exists as to the lawfulness of the charges, the burden of establishing lawfulness is on the carriers. They cite *United States v. New York, N. H. and H.R.R. Co.*, 335 U.S. 253, 1957 and 9 Wigmore on Evidence, paragraph 2346, at p. 275 (3d edition 1940) for the proposition that the burden of proof of going forward normally falls on the party having knowledge of the facts involved. On the issue of lawfulness, the conferences believe that the carriers should have shown how frequently problem residential deliveries occur and that no other class of deliveries involve significant difficulty. This is the type of evidence that would justify singling out residential deliveries for extra charges. They do not believe that all commercial deliveries involve average or below-average degrees of difficulty but that drivers could have come up with similar horror stories for them too if called upon to do so. They characterize the carrier-presented Meyer study as a comparison of apples and oranges since average deliveries are significantly altered by multiple shipments and residential deliveries are made up almost exclusively of single shipments. The conferences see these charges as particularly burdensome on small shipments because it represents a high percentage of the total line-haul charge, especially on minimum charge movements. The conferences believe that the carriers are utilizing various add-on charges[1] as effective embargoes to price themselves out of a market that their common carrier obligations require them to serve. They claim the essential point to be that the line-haul rate requires one pickup and one delivery. Also these charges are discriminatory and prohibited by section 217(b) of the act in that their application depends on the driver's judgment and none of the carriers have even suggested that their drivers uniformly recognize the proper application of the charge and uniformly collected them. The conferences believe that the distinction between deliveries to consignees who conduct a walk-in business and consignees who conduct business outside the home is also discriminatory. No cost of service differential exists for such a distinction to be valid and a driver would not even recognize all businesses that service a walk-in trade since they are not noted on the bill of lading. The conferences believe that the carriers have recognized the impossibility of relating their rates and charges to the "extra" cost of service and that they have failed to mention that many commercial businesses lack unloading equipment and loading docks. To resolve some of the practical problems associated with advance notice to the receivers, the conferences suggest following modifications to the proposed paragraphs (e)(2) and (e)(3).

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[1] For example, on single-shipment pickups, notification, area arbitraries, inside pickup and delivery, on-hand notices, storage, redelivery, and LTL detention.

> (e)(2) Whenever: (1) the bill of lading notes that delivery is to be made to residential and other related types of premises such as those described in paragraph (e)(1); (2) freight charges have been prepaid; (3) the consignee's telephone number is noted on the bill of lading; and (4) charges for redelivery are applicable; the carrier must reach agreement with the consignee or consignor before attempting delivery regarding the date and approximate time of such delivery. This arrangement for delivery may be accomplished through notation by the consignor on the bill of lading, or by oral or written agreement between the carrier and the consignee.
>
> (e)(3) If the carrier complies with the regulation described in paragraph (e)(2) of this section and, through the fault of the consignor or the consignee, is unable to tender delivery as scheduled, a reasonable charge to cover additional costs of notification, arrangement, and redelivery may be assessed. Prior arrangement for tender of delivery must be made whenever redelivery is necessary if a charge for redelivery is applicable.

The conferences suggest that a Commission decision in this proceeding could trigger the application of additional accessorial charges. For example, they believe that if the Commission finds residential charges unlawful, the carriers will find that extra charges for inside pickup or delivery are applicable on residential deliveries. These charges are substantially the same so that there would be no carrier revenue loss from an adverse Commission decision in this proceeding. The conferences believe that the time has come for a general Commission investigation into the justness and reasonableness of an increasing number of extras that motor carriers currently apply on small shipments.

Outboard Marine Corporation believes that the carriers' position that their primary duty is to serve commercial accounts is a denial of their basic common carrier duty to serve all members of the general public on an equal basis. It believes that residential delivery charges violate section 216(b) in that they are assessed on shipments from or to a class of consignors/consignees regardless of the service requested or furnished to those persons while other charges are assessed on an "as used" basis. It cites *Lovelace Manufacturing Co. v. Roadway Express, Inc.*, 104 Fed. Supp. 809, 812; *Consolidated Freight Lines, Inc., Com. Car. Application*, 11 M.C.C. 131, 136; *Universal Cartage Co.—Purchase—Dixie Cartage Co.*, 37 M.C.C. 107, 109; and *Investigation of Practices—United Warehouse Co.*, 316 I.C.C. 5, 9, to support the premise that one pickup at origin and one delivery at destination are normally included in motor common carriers' line-haul rates. It points out the proposed rule does not curtail compensation for additional services requested and rendered. It disagrees with the carriers that the Commission's result in Ex Parte No. MC-77 (Sub-No. 1), *Restrictions on Service by Motor Common Carriers*, 119 M.C.C. 691 (1974), is any dogmatic endorsement of residential delivery charges. It claims that notification of consignees prior to delivery is a service historically provided by the vast majority of motor common carriers without additional charge and that even those carriers who have established charges for such notification provide for them only on LTL or any quantity shipments. It claims that the question of the carrier's duty to provide notification prior to delivery has not been considered by the full Commission. In those instances where the matter arose because carriers tried to impose charges for furnishing the service, the charge was either voluntarily withdrawn by the carrier, not defended by the carrier and ordered canceled by the Commission's employee boards, or else found to be not shown just and reasonable by the board.[4]

Outbound Marine Corporation believes that the carriers have failed to supply competent evidence to substantiate the level at which the residential charges are set. Referring to the verified statements of Henry V. Meyer and Robert L. Steed it states that even if these "studies" are deemed sufficiently accurate to be of probative value, which it does not believe they are, a difference of from 2 to 9 minutes per stop is not such an extended period of time as to support charges of more than $1 per hundredweight being assessed as a residential delivery charge.[5] It believes that there is no rational connection between the cost incurred and the level of residential charges. Rather the charges are set so as to cover the cost of the additional services of inside delivery or handling freight at positions not immediately adjacent to the carrier's vehicle which might or might not be encountered on a given shipment. It believes that the carriers have unilaterally modified the bill-of-lading contract and that section 216(d) prohibits a redelivery charge when no notice has been given to the receiver of an impending delivery.

The Commission's Bureau contends that the carriers have not cost justified the charges and that their arguments of greater costs apply to all small shipments, not just residential pickups and deliveries. It claims the tariff discimination based on the status of the occupier of the delivery point and not upon difficulty in effecting delivery is discriminatory. Using this reasoning it proposes that prenotification by the carriers be discretionary in all instances regardless of whether the shipment is destined to a residential or a commercial location provided, however, that only in the event that a carrier elects to prenotify the consignee of the date and approximate time of delivery, may it assess a redelivery charge upon the consignee's failure to take delivery. With this modification, the Bureau supports the proposed rules.

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[4] I. and S. Docket No. M-24259, *Shipments Requiring Notification Prior to Delivery;* I. and S. Docket No. M-25252, *Charge for Notification Prior to Delivery;* I. and S. Docket No. M-27912, *Notification Prior to Delivery, Central Territory;* I and S. Docket No. M 27912 (Sub-No. 3), *Notification Prior to Delivery, Jones Transfer Company;* I and S. Docket No. M-28547, *Charge for Notification Prior to Delivery;* and I. and S. Docket No. M-28547 (Sub-No. 1) *Notification Prior to Delivery, Rocky Mountain Tariff Bureau.*

[5] Tariff I.C.C. CMB 100-D, item 753; Tariff I.C.C. CSA 127-A Supplement 81, item 753-B, Tariff I.C.C. ECA 149-K, Supplement 30, item 753-B, Tariff I.C.C. MWB 125-C, Supplement 22, item 753-A; Tariff I.C.C. RMB, 18th revised page 23, item 753; Tariff I.C.C. SMC 190-A, Supplement 9, item 753-A.

The American Camping Association (association) cites *Western Co-op. Trucking Assn. Rates in Minn., and N. Dak.*, 19 M.C.C. 511, 513, for the proposition that these extra charges are anomalies since line-haul rates traditionally include the cost incurred in providing a single pickup and a single delivery. The association criticizes the carriers' failure to produce any statistics on how often the problems they describe in delivering to camps are encountered. Its evidence shows that charges are imposed on about 20 percent of the camp deliveries and it claims this inconsistent application is in itself discriminatory. It believes the charges violate section 216(d) in that the blanket assessment of extra charges for all camp deliveries irrespective of actual service rendered is an unjust and unreasonable practice and that when carriers require shippers to pay twice for the same service the carrier violate section 216(d). The association argues that camps are located in places similar to where commercial enterprises such as mines, logging, operations, quarries, rural construction projects and vacation resorts are located. Assessment of the special delivery charge against camps based on their location and not against similarly situated commercial enterprises is discriminatory and violates section 216(d). It favors adoption of the proposed rules.

The motor common carriers of property which are members and parties to the tariffs of the Eastern Central Motor Carriers Association, Inc. (ECMCA), believe that any issue as to the lawfulness of presently effective tariff provisions was eliminated by the Commission's order of November 7, 1975, confirming that the proceeding was a rulemaking proceeding. It is ECMCA's position that the carriers' general rate levels are predicated upon the normal characteristics encountered in the transportation of freight for commercial accounts. Those rate levels do not take into consideration the additional expenses encountered in performing pickup or delivery at private residences. On the issue of redelivery charges, ECMCA stresses that redelivery charges as presently published make no distinction between commercial and residential service. The present charges apply equally to all shipments and their basis is the necessity of permitting carriers to recover the added expense entailed in making a second delivery. ECMCA contends that mandatory prenotification on residential shipments would be both discriminatory and would require numerous additional cost procedures. It believes that the proposed rule to be contrary to the Commission's case law as established in I. and S. Docket No. M-24259, *Shipments Requiring Notification Prior to Delivery*, I. and S. Docket M-25252, *Charge for Notification Prior to Delivery*, I. and S. Docket No. M-27912, *Notification Prior to Delivery, Central Territory*, and I. and S. Docket No. M-27912 (Sub-No. 3), *Notification Prior to Delivery, Jones Transfer Company*. It believes that the record unequivocally establishes the conclusion that residential pickup and delivery differ uniquely from commercial service and result in increase difficulty and costs. It contends that the traffic at issue here represents an absolute de minimis aspect of motor carrier business and that because of this fact commercial service characteristics control the determination of the rate structure. It contends that commercial sites are specifically designed to receive freight, the vast majority have loading and unloading docks and have equipment and personnel available to unload freight. It stresses that the entire system of transportation rates and pricing is founded upon averages. It cites *Inside Pickup and Delivery*, 66 M.C.C. 319 (1956), for the interpretation of pickup and delivery service as not including inside delivery. It also cites *Tennessee Carolina Transp. Inc.—Investigation*, 337 I.C.C. 542 (1970), for the proposition that unloading service is provided by the movement of lading past the tailgate of the vehicle. It cites e verified statements attached to its initial statement to show that residential sites e not designed to receive traffic. Also, carrier personnel who are not obliged to rovide inside deliveries often do so out of simple courtesy. It does not contend that e problems it describes are encountered on every individual shipment, rather these roblems are indigenous to this class of traffic and distinguishes it as a class from the ast preponderance of motor carrier traffic moving to or from commercial stablishments. Because of these class differences, ECMCA contends it is appropriate o require this traffic to bear its special costs in order to avoid burdening commercial raffic with costs for which it is not responsible. Since it is not possible to develop a ate structure which will produce charges for shipments based on their individual andling, it is necessary to base the rate structure on average circumstances. For this eason, the fact that a particular shipment may be delivered to a high rise building aving a loading platform and a full-time attendant is no reason to exempt residential hipments from the assessment of charging predicated upon average conditions. The eneral ECMCA provision governing redelivery applies equally to all shippers. To insert a special procedure for notifying a particular type of receiver, without charge, would discriminatory, would inhibit the free flow of freight, and would cause insurmountable difficulties in ascertaining which shipments involve residential deliveries.

The Mail Order Association of America believes that the carriers have failed to cost justify the charges in question. It urges that the Commission not accept the general statements made by the carriers in support of the proposal. It responds to the carrier argument that they did not have sufficient time in which to develop cost data with the observation that none of the motor carriers requested additional time to prepare cost evidence at the prehearing conference. Even though a few carriers submitted certain data, it believes this material falls short of justifying charges for all carriers in all areas. It believes the public better served by requiring carriers to recover all costs from standard tariff charges applicable to all shippers and consignees and does not think that consumers who purchase products by mail order should be burdened by additional charges. It believes that the carriers' arguments that the residential deliveries are necessarily more costly are negated by changing traffic patterns and other conditions in urban locations. It contends that this proceeding is particularly important to the public and especially firms and receivers engaged in buying and selling products via catalogs. It cites the restriction in the tariffs of United Parcel Service, specialized delivery carriers, and the United States Postal Service which make receivers of large items dependent upon motor common carriers. It believes that the statements indicate that most carriers have implemented to a substantial extent the spirit of the proposed prenotification rules and the rules should be adopted since prenotification will result in savings for both carriers and receivers.

The Motor Carriers Traffic Association, Inc. (association), contends that while the Commission began this proceeding in the belief that there existed a problem of widespread significance the record discloses that only a few parties seek to eliminate the extra charges and these represent special interests seeking to obtain special advantage. The additional delivery and redelivery charges the association publishes on behalf of its members appear in two tariffs (the Carolina Furniture Tariff) (Tariff 2-T, MF-I.C.C.-938) and the rules tariff (Tariff 523-N, MF-I.C.C. 963). It believes that these extra charges are fully justified by the carriers' experience in handling the traffic. In particular, it cites the verified statements of two of its member carriers as to the extra labor costs involved which they incur in making residential deliveries. It contends that these additional costs are indisputable, that the carriers had no alternative but to acquiesce in them and that such charges are in line with the

Commission's admonition in Ex Parte No. MC-98, *New Procedures in Motor Carrier Restructuring Proceedings.* The association's membership includes many specialized furniture haulers who operate from terminals adjacent to the manufacturing centers and deliver items directly from 50- to 55-foot tractor-trailer combinations. In addition to the problems associated with using this type of equipment, the association's brief reiterates the other problems it contends are associated frequently with residential deliveries. Members of the association have already adopted procedures for giving notice to receivers before delivery is attempted. They therefore have no disagreement with paragraph 2 of the proposed rules. Practically speaking, however, scheduled deliveries would be impossible.

Members of the major motor common carrier tariff bureaus[6] (Bureaus) contend (1) that motor carriers are under no burden in this proceeding to justify the existing level of present residential delivery charges, (2) that the evidence submitted by the carriers fully justifies the continuance of such charges, (3) that the cost evidence submitted by the carriers was fully appropriative and sufficient within the time frame of this proceeding to justify the continuance of the charges, (4) that requiring notification prior to delivery to residential consignees without a charge is contrary to Commission law and prejudicial and preferential to other consignees, (5) that the present redelivery charges are lawful in all respects and (6) that arguments in favor of the proposed rules are unpersuasive. The bureaus contend that by this proposal for advance notice of delivery, the Commission is selecting one type of consignee for special treatment and requiring carriers to do something free which they have never been required to do before. It believes that if the Commission declares residential charges unlawful it will be using rulemaking to deprive carriers of specific revenue without consideration of their overall revenue needs and that this would be unprecedented. It characterizes the data as conclusive that there are generally significant differences in providing pickup or delivery service to residential vis-a-vis commercial-type premises.

The Southern Motor Carriers Rate Conference, Inc., cites *Minimum Rates—Martella—Apgar Bros.*, 66 M.C.C. 125; *Class Rates, Chicago, Ill., to Texas*, 302 I.C.C. 21; and *Canned Goods from Pa. and Md. to Md., Va., and W. Va.*, 303 I.C.C. 413, to support its position that when rates are in effect, the parties assailing them in an investigation have the burden of proof. Also *Liquid Sugar to Ohio Points*, 306 I.C.C. 298, is used for the proposition that no inference can be drawn that effective rates are unjust or unreasonable from the fact that respondents chose not to introduce any evidence to show that the rates are compensatory. It believes that the Administrative Procedure Act, 5 U.S.C. 556(d) puts the burden of proof on the proponent of a rule and that the Commission's Bureau could have produced cost evidence but chose not to do so. Finally, in its view, adoption of the proposed rules would be contrary to the spirit of Ex Parte No. MC-98, *New Procedures in Motor Carrier Restructuring Proceedings.*

The Traffic Managers Conference of California believes that residential delivery charges duplicate other carrier charges, that they are unreasonable because they cover a variety of services which are often not performed, and that they violate Tariff Circular MC-3 which requires specific and unambiguous language.

United Parcel Service, Inc. (New York and Ohio) (UPS), urges that no rule be adopted which would require: (1) imposition of additional or premium charges for delivery to residential or other types of premises; (2) notification to consignee prior to delivery or attempted delivery to residential or other types of premises; or (3) any other changes in United Parcel Service's present practice and procedure in making residential or other deliveries. UPS delivers hundreds of thousands of packages every day to private residences and to other premises which may be considered within the scope of this proceeding. It does not assess any additional or premium charge for this type of delivery. Delivery is attempted without prior arrangement or contact with the consignee. The great majority of packages are delivered on the first attempt. Where delivery cannot be made on the first attempt, a second and, if necessary, a third attempt is made without additional charge.

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[6] Central and Southern Motor Freight Tariff Association, Central States Motor Freight Bureau, Middle Atlantic Conference, Middlewest Motor Freight Bureau, New England Motor Rate Bureau, Pacific Inland Tariff Bureau, and Rocky Mountain Motor Tariff Bureau.

In each instance of nondelivery, a Delivery Notice is left at the residence advising that delivery has been attempted, when the next delivery attempt will be made, and how to contact UPS should special delivery arrangements be required. If UPS is unable to effect delivery on the three attempts, the package is returned to the shipper without additional charge.

APPENDIX B

Middle Atlantic Conference Tariff 192-A, MF-ICC A-2804

Inside delivery.—Section 2(a)(1) of rule 750-1, Pickup or Delivery Service, provides that when the carrier is required to perform pickup or delivery service from or to locations within the consignor's or consignee's premises which are not adjacent and accessible to carrier's vehicle, such additional service will be performed on LTL or any quantity shipments at the ground floor level or other than ground floor level at a charge of 122 cents per 100 pounds, minimum $6.67. Section 2(b) states that service under paragraph (a) will not be rendered to floors above or below the level accessible to carrier's vehicle unless elevator or escalator service is provided by consignor or consignee.

Extra labor.—Section 3(a) of item 560-1, Extra Labor, provides that at each location where additional labor is used the charge per additional man per vehicle for each day or fraction thereof shall be 33 cents per 100 pounds, minimum $39.73, maximum charge $75.67.

Middle Atlantic Conference Rate Group Tariff 12-T, MF-ICC A-2797

Arbitraries.—Note 114 provides that rates or charges from or to points referring to this note will be assessed an additional pickup and/or delivery charge shown below, subject to a minimum charge of $1.84 per shipment, in addition to all other lawful charges. The charge is based on the freight class applicable to the shipment, and ranges from 93 cents per 100 pounds to 33 cents per 100 pounds.

Middle Atlantic Conference New York State Tariff 4-P, MF-ICC A-2774

Single shipments.—Item 885 announces that single shipments of less than 500 pounds picked up at one time and site, unaccompanied by any other shipment of any description from the same consignor, will be subject to a charge of $3.25 per shipment in addition to all other lawfully applicable charges in this and governing tariffs. Carrier's driver will write or stamp "Single Shipment" on all bill of lading copies when such shipments are tendered. The rule is subject to item 190 of the tariff. That item provides that the single shipment charge shall not exceed the charge which would have applied if the lading had weighed 500 pounds.

APPENDIX C

Cost evidence

The parties seem to agree that charges for residential traffic different from those applicable to other shipments handled in intercity-interstate commerce by motor common carriers should be cost justified. Materials which could be characterized as cost studies are set forth in the following verified statements.

Witness	*Initial statement*
1. Meyer	Rocky Mountain Motor Tariff Bureau
2. Steed	Southern Motor Carriers Rate Conference
3. Hassett	Oneida Motor Freight, Inc.

None of the submissions used probability sampling techniques to obtain data. All the trips surveyed originated between October 20 and December 5, 1975. These surveys were designed to show that the average minutes for a residential pickup or delivery are greater per 100 pounds than for a commercial pickup or delivery. The minutes per 100 pounds have not been translated into costs and no revenue-to-cost comparison has been attempted. The Commission has commented on such studies in *L.T.L. Class Rates & Minimum Charges—Midwest & Central*, 325 I.C.C. 106, 111 (1965):

> It is apparent *** that no serious effort was made to compile a study which would be representative of the carriers involved or of the day selected. In each instance the control factor was left to chance. That is, carriers who answered the survey correctly were assumed to be representative of the group and the day selected by each carrier was assumed to be representative of its operations. Data accumulated in this haphazard manner has little probative value.

It is the position of the National Industrial Traffic League (NITL) that the time differences between residential and commercial locations goes to the number of shipments being delivered, not to any alleged differences in the character of the premises being served. Moreover the NITL maintains that the cost revenue comparisons which the various regional bureaus submit in support of their general increase proposals[1] include an allocation of all the costs related to the time and effort involved in performing pickups and deliveries at private residences and the other similarly treated locations.

1. Mr. Meyer of Rocky Mountain Motor Tariff Bureau, Inc., at Denver, Colo., conducted a survey to which six carriers operating in Pacific region (PR) and Rocky Mountain region (RMR) responded.[2] Freight bills on shipments to private residences

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[1] The Form 4, Pickup and Delivery, of the Commission's Highway Form A performed in each territory or by the individual Instruction 27 carriers

[2] The carriers and study periods were

Garrett Freightlines, Inc.—October 20 through October 31, 1975
Lee Way Motor Freight, Inc.—October 20 through October 30, 1975
IML Freight, Inc.—November 24 through December 5, 1975
Pacific Motor Trucking Co.—October 27 through December 7, 1975
Consolidated Freightways Corp.—November 16 through November 22, 1975
Milne Truck Lines, Inc.—October 26 through November 8, 1975

disclosed that 825, or 82 percent, covered shipments weighing less than the 400-pound upper weight limit internally placed on the survey. Those 825 shipments were studied. Variable running man-minutes for those shipments were determined by averaging the running time to and from the delivery residence. (Variable running time is defined as that time related to, or variable with, the number of stops made.) Man-minutes at residence (stop) were also compiled. Running minutes and stop minutes were separately divided by total shipments and total pounds, and the resultant averages added to yield total minutes per shipment and total minutes per hundredweight.

Similar data on pickup and delivery for all categories of shippers and consignees were abstracted from the work table 2's underlying Commission Statement No. 2C1-73, *Cost of Transporting Freight by Class I and II Motor Common Carriers of General Commodities, 1973*, for the two regions and the same mathematical computations were made.

Item	Six carriers surveyed	ICC cost statement	
		RMR	PR
Average pounds per shipment	148	154	156
Vehicle running minutes per shipment	13.68	4.64	6.02
Man-minutes at stop per shipment	9.19	5.71	6.32
Total minutes per shipment	22.87	10.35	12.35

The comparison offered is between a 1- or 2-week carrier survey and the results of a 1 year Commission study. No explanation is offered for the survey's use of a weight group of 0-399 pounds from the Commission's cost study instead of the 100-199 weight group which would embrace the average shipment of 148 pounds. The mixture of vehicle time and driver time in the survey fails to reflect the use, if any, of helpers. The number of stops is not shown, so that information as to single- and multiple-shipment stops is not available although such facts have serious cost consequences. These missing data go to the NITL contention that the man-minutes per shipment is more directly related to the number of shipments per stop than to the designation of the location as a private residence or commercial premises. Even if one accepts the comparison as valid, the NITL considers the differences in vehicle running minutes and man-minutes at the stop per shipment de minimis.

2. Robert L. Steed of the Southern Motor Carriers Rate Conference (SMC) conducted a comparative study of residential versus general pickup and delivery trips of five carriers.[3] For the first and fifth trip on a selected day during the week of December 1-5, 1975, the carriers prepared special trip manifests. Reports were completed at 67 terminal locations of which 53 are in the southern territory. Operational data were developed on 6,039 shipments, including 2 pickups and 74 deliveries at residences. At other than residences, 5,873 shipments weighing less than 10,000 pounds, and 90 shipments weighing 10,000 pounds and over, were handled. Time and miles between the terminal and first stop and between the last stop and terminal were apportioned equally to each shipment handled on the trip. Minutes

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[3] The study carriers were: Campbell Sixty-Six Express, Inc., Colonial Motor Freight Line, Inc., Johnson Motor Lines, Inc., Overnite Transportation Company, and Ryder Truck Lines, Inc.

(running and stop), miles, number of shipments, and weight were aggregated. Minutes and miles were then divided separately by the hundredweight, the number of stops and the number of shipments to obtain the various averages shown in the following table:

Southern Motor Carriers Rate Conference's comparison of residential pickup and delivery trips with all other pickup and delivery trips

	Residential stops		All other stops	
	Pickups	Deliveries	0-9,999 pounds	10,000 + pounds
Average shipments per stop	1	1	1.25	1.50
Average minutes per stop				
Running	21.0	17.4	14.1	—
Stop	10.0	14.1	14.1	—
Total	31.0	31.5	28.2	—
Average minutes per shipment				
Running	21.0	17.4	11.2	—
Stop	10.0	14.1	11.2	—
Total	31.0	31.5	22.5	—
Average minutes per hundredweight				
Running	14.0	8.0	1.7	—
Stop	6.7	6.5	1.7	—
Total	20.7	14.5	3.5	—
Average vehicle-miles per stop	8.5	7.5	4.7	17.8
Average vehicle-miles per shipment	8.5	7.5	3.8	11.8

The Commission's Highway Form A assigns the running minutes between the terminal and first stop and between the last stop and terminal (stem time) on each trip equally to each ton picked up or delivered on the trip, i.e., on the basis of the weight handled. The stem time was handled in this manner in the formula underlying Commission Statement No. 2C1-73, *supra*. On the other hand, SMC explains that it apportioned the stem time on the "basis of shipments handled on the trip." The departure from our cost techniques in data collection and use are said to be in the interest of simplification. This simplistic approach does violence to the appropriate allocation/apportionment of common elements in pickup and delivery operation. All separations of common time, i.e., joint expense, used in developing the result in witness Steed's survey are on a shipment basis with the inequitable result that the 217-pound residential delivery is assigned the same amount of common time as is the 17,896-pound truckload commercial shipment. SMC claims it only used timely data. No evidence is provided concerning the total data collected nor the number of carriers originally solicited although such information is useful in weighing the evidence. As it stands, the survey raises more questions than it answers. For example, (1) residential deliveries average 217 pounds while other LTL traffic of up to 10,000 pounds average three times heavier; (2) the residential traffic is all single shipments, yet the survey does not compare them with a like occurrence which is single-shipment LTL traffic; and (3) no information is provided concerning the number of pieces in each shipment. The thrust of these observations goes to the adequacy and comparability of the data.

Taking this material as submitted it is interesting to note that despite the carrier's claims of delays caused by the unfamiliarity of persons receiving the shipments with carrier procedures, the time at the stop is identical for residential and on LTL traffic to all other receivers. Also, witness Steed claims that "residential stops are usually substantially 'out-of-route' as compared to non-residential stops," however, the survey found that residential deliveries required 7.5 vehicle-miles whereas truckload shipments required 11.8 vehicle-miles.

3. Mr. William Hassett of Oneida Motor Freight, Inc., which operates between points in New York, New Jersey, and the Philadelphia, Pa., area, conducted a survey of 399 commercial shipments and 45 shipments from and to private residences on November 5, 7, 11, and 12, 1975. Of the 399 commercial shipments, 20 involved inside delivery. Running and stop minutes were totaled and divided separately by the number of shipments and the total weight carried. A few shipments were also assigned the time traveling from the stop where the vehicle was required to retrace its route back to a through road.

Using the figures given, it is possible to calculate the vehicle running time and the time at the stop on the basis of the number of stops. These figures as well as similar averages per shipment for commercial shipments (596 pounds per shipment) and residential shipments (166 pounds per shipment) in minutes are as follows:

Item	Commercial	Residential
Running		
Per stop	14	15
Per shipment	14	15
At stop		
Per stop	14	12
Per shipment	14	12
Totals		
Per stop	28	27
Per shipment	27	27

Witness Hassett also compares the average minutes per 100 pounds. However, a certain amount of time is required to deliver any weight shipment and here where the commercial shipments are four times heavier a comparison on this basis would always favor the heavier shipments.[4]

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[4] See Shrock, David L., "Motor Carrier Cost Analysis—The Next Step," ICC Practitioners' Journal, July-August 1975, p. 574.

> The problem of cost determination is further complicated by the fact that dock worker productivity increases, per hundred pounds moved, as shipment size increases. This is because the time required to perform some portions of the movement, such as locating the shipment on the dock, will remain nearly constant regardless of the size of the shipment.

TITLE 49 - TRANSPORTATION
SUBTITLE B - OTHER REGULATIONS RELATING TO TRANSPORTATION
CHAPTER X - INTERSTATE COMMERCE COMMISSION
SUBCHAPTER D - TARIFFS AND SCHEDULES
PART 1307 - FREIGHT RATE TARIFFS, SCHEDULES AND CLASSIFICATION OF CARRIERS

ORDER

EX PARTE NO. MC-97

INVESTIGATION INTO PRACTICES OF MOTOR COMMON CARRIERS OF PROPERTY ON RESIDENTIAL AND REDELIVERED SHIPMENTS

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D.C., on the 9th day of May 1977.

It appearing, That an investigation of the matters and things involved in the above-entitled proceeding having been made, and the Commission having made and filed a report containing its findings of facts and conclusions therein, which report is hereby made a part hereof:

It is ordered, That Subchapter D, Chapter X of Title 49 of the Code of Federal Regulations be, and it is hereby, amended by adding to subpart 1307.35 the following:

(e) Assessment of charges on shipments orginating at or destined to private residences and other types of premises.

1. Tariffs of for-hire motor common carriers shall not provide for the application of rates or the imposition of charges, by whatever means, for movements to or from, for example, private residences, apartments, churches, schools, camps, and other such locations, which differ from otherwise applicable rates from or to other locations such as businesses, warehouses, and other generally recognized commercial locations.

2. Before attempting delivery to residences and other related types of premises such as those described in 1, the carrier must reach agreement with the consignee or consignor regarding the date and time (approximate) of such delivery. This arrangement for delivery may be accomplished through a notation by the consignor on the bill of lading, or by oral or written arrangement between the carrier and the consignee. In any case, some mutually agreed-upon arrangment for delivery must be made before tender of delivery is initially attempted

3. If the carrier complies with the regulation described in 2, and, through the fault of the consignee, is unable to tender delivery as scheduled, a reasonable charge to cover the service described in 2 and additional costs of the renotification, arrangement, and redelivery may be assessed. The requirements of 2 regarding prior arrangement for tender of delivery are similarly applicable when redelivery is necessary.

It is further ordered, That all for-hire motor common carrier respondents herein are notified and required to cease and desist from using practices which are contrary to the rules adopted and are required to eliminate such inconsistent provisions from their effective tariffs on or before 60 days from the date of service of this order.

It is further ordered, That this proceeding be, and it is hereby, discontinued 35 days from date of service of this order.

And it is further ordered, That notice of this order shall be given to the general public by depositing a copy thereof in the Office of the Secretary of the Interstate Commerce Commission, at Washington, D.C., and by filing a copy with the Director, Office of the Federal Register.

No. 36280

PPG INDUSTRIES, INC. v. THE AKRON & BARBERTON BELT RAILROAD COMPANY

Decided May 11, 1977

Upon reconsideration, demurrage charges assessed on several covered hopper railcars found applicable but shown to have been unjust and unreasonable. Demurrage on all other nonassigned covered hopper cars assessed pursuant to Car Service Order No. 1112 found applicable and not shown to be unjust, unreasonable, or otherwise unlawful. Initial decision and order vacated, demurrage charges waived in part on 11 cars, and proceeding discontinued.

John S. Graham for complainant.
David A. McCormick for defendant.
Albert W. Laisy for intervener.

REPORT AND ORDER OF THE COMMISSION ON RECONSIDERATION

DIVISION 2, ACTING AS AN APPELLATE DIVISION. COMMISSIONERS HARDIN, O'NEAL, AND CHRISTIAN

BY THE DIVISION:

The modified procedure was followed. By complaint filed November 20, 1975, PPG Industries, Inc. (PPG), a corporation of Pittsburgh, Pennsylvania, alleges that demurrage charges assessed by defendant Akron & Barberton Belt Railroad Company (A&BB) on 39 covered hopper cars during the period January 1973 to April 1973 are unjust and unreasonable in violation of section 1 of the Interstate Commerce Act. Complainant seeks relief from the collection by defendant of $13,500, which is the difference in amount between the assessed demurrage charges and the assigned car storage charges calculated by the complainant in accordance with Car Service Order No. 1112.

In the initial decision, served May 28, 1976, the Administrative Law Judge found that the 39 railcars in question were not assigned to the complainant in accordance with Car Service Order No. 1112, and that demurrage charges were properly assessed by defendant

A&BB. Exceptions to the initial decision of the Administrative Law Judge were filed late by complainant PPG on June 24, 1976, and were treated as a petition for reconsideration. Defendant A&BB replied on July 1, 1976.

Thereafter, by order served August 2, 1976, the Commission granted the Baltimore and Ohio Railroad Company (intervener) leave to intervene and submit a statement, which was subsequently filed on August 30, 1976. Upon consideration of complainant's petition, defendant's reply, and the statement of intervener, the proceeding was reopened for reconsideration by order of division 2, served January 19, 1977. Replies to intervener's statement were filed by complainant and defendant on February 7 and 9, 1977, respectively. Defendant further filed on February 15, 1977, a motion to strike portions of complainant's reply to the statement of intervener. No reply to the motion to strike was filed by complainant.

The basic facts were set forth accurately by the Administrative Law Judge. Accordingly, they will be restated and supplemented only insofar as necessary for a proper understanding of the issues.

Complainant PPG operates an industrial chemical plant at Barberton, Ohio, and transports its chemical shipments via rail. Defendant A&BB is a switching and terminal rail carrier which provides rail service to the PPG plant, and is owned by Akron, Canton, and Youngstown Railroad (AC & Y), the Baltimore and Ohio Railroad (B&O), the Erie-Lackawanna Railroad (E-L) and the Penn Central Transportation Company (Penn Central). As a switching railroad, defendant A&BB owns no cars, and receives its car supply from its four proprietary lines, each of which has a 25-percent interest in the defendant.

Prior to December 22, 1972, complainant PPG orally requested each of the aforementioned four proprietary lines to supply for assignment a number of covered hopper cars for the first quarter of 1973. By letter dated December 22, 1972,[1] PPG confirmed its oral request in writing to Penn Central. PFG did not submit to any other carrier a written request for additional assigned cars.

On July 3, 1973, Penn Central wrote to defendant A&BB that 11 cars owned by Penn Central had been assigned to PPG during the months of January, February, and March 1973, pursuant to the written request of PPG Industries on December 22, 1972. There is no evidence in the record of any other written communication to or from anyone with respect to car assignments.

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[1] This date was incorrectly typed as December 22, 1975, in the initial decision. Complainant's contention in its petition for reconsideration that this typographical error was a material and substantial misstatement of fact is without merit, since it is evident from the subsequent paragraphs of the initial decision that the Administrative Law Judge was aware of the actual date of the letter in arriving at his decision.

The demurrage charges in question accrued on 39 covered hopper cars between January 1973 and April 1973, and were assessed by defendant in accordance with Agent B.B. Maurer's Tariff 4-J, I.C.C. H-59, subject to Car Service Order No. 1112, effective October 9, 1972, through December 15, 1974. The relevant portions of Car Service Order No. 1112 are as follows:

> Section 1033.1112 Railroad Operating Regulations For Freight Car Movement
>
> (a)(1) Application
>
> * * * * * * *
>
> (viii) This order shall apply to all empty cars described in part (iii) of this section, which are assigned to the exclusive use of a specified shipper, except as otherwise provided in this section.
>
> * * * * * * *
>
> (x) * * * Requests for assignments of cars must be secured in writing, or confirmed in writing, by the carrier on whose lines the cars are assigned, not less than ten days before the effective date of the car assignment * * *.
>
> (2) Placing of cars
>
> * * * * * * *
>
> (ii) Empty cars which are in general service and are not assigned to the exclusive use of a specified shipper, which after placement will be subject to demurrage of detention rules applicable to cars for loading * * *.
>
> (iii) Empty cars described in Section (i) part (viii) which are assigned to the exclusive use of a specified shipper shall be subject to a storage charge of $5.00 per car per day * * *.

The complaint by PPG alleges that the defendant improperly assessed demurrage charges on the 39 covered hopper cars at complainant's plant in Barberton, Ohio. Complainant contends that: (1) Article (1)(x) of Car Service Order No. 1112 does not require written confirmation to or from the shipper or assignee in order for cars to be assigned in accordance with the service order, (2) the 39 cars in question were intended and believed by complainant to be assigned, (3) it would be illogical to expect a written request for additional cars to be addressed to defendant since they own no cars and, as a practical matter, car supply comes from the four proprietary lines, (4) defendant had the obligation and duty under the car service order to secure and confirm in writing requests for assignment, (5) any failure of defendant to obtain written confirmation of assignment was due to the lack of internal communications between defendant and its proprietary lines, and (6) the applicable charge on the 39 cars in question should be the $5 per day storage charges prescribed in the car service order for assigned cars. Moreover, complainant implies that even if the cars in question were not assigned in accordance with the technical requirements of Car Service Order No. 1112, the assessment of demurrage charges would be unjust and unreasonable under the circumstances at least with respect to the 11 Penn Central cars, where written confirmation was sent to Penn Central by complainant.

In reply, defendant states that it had a duty to assess the demurrage charges in question, since the involved cars were never assigned to the exclusive use of complainant as required by Car Service Order No. 1112. Defendant contends that the car service order requires all requests for car assignments be secured in writing, or confirmed in writing, by the carrier on whose lines the cars are assigned, and that defendant, as the carrier on whose lines all such cars are assigned, had no knowledge of complainant's oral or written requests for specific car assignments when it constructively placed for loading each of the 39 cars in question.

The Administrative Law Judge, in his initial decision, strictly interpreted Car Service Order No. 1112, and stated the following:

> Defendant [A&BB railroad] was the carrier whose lines the cars in question assertedly were assigned. Defendant did not send any writing or confirm in writing that the subject cars were assigned. Moreover, defendant did not receive or secure any writing concerning the cars until the transportation in question was completed. Thus, pursuant to the literal terms of the quoted rule, there was no assignment of cars.

Predicating his decision upon whether an assignment of 39 cars took place as defined in Car Service Order No. 1112, the Administrative Law Judge concluded that all the cars were not assigned, and that the demurrage charges were properly assessed.

On reconsideration, complainant contends that the Administrative Law Judge made an erroneous finding of fact contrary to evidence in the record which states that several Penn Central cars were assigned by Penn Central to complainant, and that the Administrative Law Judge erred in failing to address the particular fact of the situation with respect to Car Service Order No. 1112. Defendant, in its reply, supports the factual findings and conclusion of the Administrative Law Judge, and states that it does not know of any mitigating circumstance which justifies nonpayment of demurrage charges.

In the statement of intervener, B&O lists several of the 39 cars in question as being assigned cars according to their records. More importantly, B&O states that the normal practice with respect to car assignments, particularly where pool assignments such as those here involved are concerned, is for the car owner to telegram the pool-serving railroad, in this instance defendant A&BB railroad, advising of the proposed assignment and asking its permission to do so.

In response to the statement of intervener, complainant notes that B&O admits it did not inform defendant A&BB of the assignments. Complainant thus asserts that it would not be equitable for it to be penalized because of a lack of technical compliance with the car service order which was the responsibility of the carriers themselves. Defendant states that they have no additional evidence to place in the record in reply to intervener, and rests its case on the record as made.

Discussion and Conclusions

Prior to reaching the merits of the instant proceeding, we must initially dispose of defendant's motion to strike a portion of the complainant's reply to the statement of intervener. Defendant contends in its motion that certain portions of complainant's reply exceed the scope of the new evidence being placed in the record, and that several remarks are argumentative and self-serving. Although complainant's reply was addressed to both the new evidence and the record in this proceeding, the reply cannot be construed as exceeding the scope of the newly admitted evidence. The remarks in complainant's reply were simply argument on the evidence in the context of the complete record, and should not be stricken as improper statements. Therefore, defendant's motion to strike is denied.

The Administrative Law Judge, in the initial decision, defined the issue in this proceeding as whether the cars in question were in assigned service to complainant, and thus whether the demurrage charges for cars in general service, rather than the storage charges for assigned cars as prescribed in Car Service Order No. 1112, were properly assessed by defendant. The Administrative Law Judge did not, however, address the issue of whether the demurrage charges resulting from the application of the car service order were unjust or unreasonable for any or all of the 39 cars in question. It is necessary, therefore, to determine the lawfulness of the assessed demurrage in terms of both applicability and the justness or reasonableness of the charges.

The conclusion in the initial decision that there was "no assignment of cars" pursuant to the literal terms of the car service order is technically correct, since defendant railroad did not confirm or secure in writing the assignment status of the 39 cars relevant to this proceeding. Moreover, we cannot agree with complainant that it was defendant's duty to secure from complainant their assignment request in writing. Defendant allegedly had no knowledge of any of complainant's assignment requests until Penn Central's delayed letter to defendant with respect to the "assignment" of 11 Penn Central Cars. Thus, since the receipt of Penn Central's letter to defendant came after the transportation service in question, the Administrative Law Judge properly found that none of the 39 cars was in assignment during the time that demurrage charges accrued, and we concur with the Administrative Law Judge's conclusion that demurrage was properly assessed by defendant. However, a review of the record and circumstances in this proceeding requires an additional finding that the demurrage charges assessed on several covered hopper cars are unjust and unreasonable.

Car Service Order No. 1112 establishes, for purposes of this proceeding, that the covered hopper cars at issue were not assigned for the exclusive use of the complainant, and that the assessed demurrage charges were applicable to all 39 cars. On the other hand, the car service order does not prescribe the appropriate standard by which shippers must request such assignment. Thus, if a proper request was made by the shipper on the facts as described herein, any consequent demurrage change would be unjust and unreasonable under the circumstances.

The applicable standard for shipper notice of car assignment requests is contained in Car Service Rule 16, as promulgated in *Investigation of Adequacy of Freight Car Ownership*, 335 I.C.C. 264, 301 (1969), modified, 353 I.C.C. 230 (1976).

The pertinent portion of Car Service Rule 16, which does not conflict with Car Service Order No. 1112 and was in effect during the transportation service in question, is as follows:

> (A) When, after the effective date of these rules, specific cars covered by CSD 145 and 435 series are assigned to a shipper for his exclusive use, such assignment shall be made subject to the following conditions:
>
> (1) Shipper must request in writing of originating road haul carrier(s) assignment at least ten (10) days before their intended use of a specific number of cars. If originating carrier(s) agrees to such assignment but desires other road-haul carriers to participate in assignment, it will advise shipper accordingly and will make request on such other carriers. A road-haul carrier may assign cars but must have the concurrence of the originating carrier which may or may not be a switching carrier.

Although Car Service Order No. 1112 required that requests for assignment of cars must be secured in writing, or confirmed in writing, by the carrier on whose lines the cars are assigned, this requirement did not negate the shipper's obligation under Car Service Rule 16 to request car assignments in writing of the originating road-haul carrier or carriers at least 10 days before their intended use of a specific number of cars.

Thus, with respect to the 11 Penn Central cars which were considered by Penn Central to be assigned to complainant, complainant's written request of December 22, 1972, was proper and sufficiently diligent to allow for complainant's reasonable belief that all Penn Central cars were in assigned service. Penn Central's obligation thereafter was to timely notify the defendant railroad of the proposed assignment. Failure to so notify the defendant resulted in a situation where neither the shipper nor the carrier who assessed the demurrage was responsible for the actual status of the 11 cars. Under such circumstances it would be unjust and unreasonable to allow for demurrage to be assessed against complainant on cars it reasonably believed to be assigned *pursuant to a proper written request.*

Moreover, the circumstances in this proceeding differ from the assignment situation where the car owner is also responsible for confirmation of a request assignment. When a pooling arrangement exists where shipper requests for assignment are normally made to the car owner, who in turn notifies the pool serving railroad of the proposed assignment, it would not be just, reasonable, or fair to require complainant to pay assessed demurrage solely because a third party failed in its obligation to timely notify the carrier on whose lines the cars are assigned of the proposed assignment.

Although it is well established that demurrage charges generally embrace two distinct elements: (1) compensation for the use of the car and tracks, and (2) a penalty designed to prevent undue detention of the cars and insure their prompt return to public service, *Ford Motor Co.* v. *Chesapeake & O. Ry. Co.*, 311 I.C.C.

559, 562 (1960), the situation in this proceeding more appropriately allows for the waiver of demurrage in excess of the storage charges which would have been assessed the complainant if the Penn Central cars in question had in fact been assigned. Therefore, in accordance with the provision in Car Service Order No. 1112 which prescribes a storage charge of $5 per car per day on assigned cars, we find that the just and reasonable charge on the 11 Penn Central covered hopper railcars is $5 per car per day.

Furthermore, as previously noted, there is no evidence in the record which indicates that complainant properly requested car assignments in writing of either B&O railroad, AC & Y railroad, or E-L railroad pursuant to Car Service Rule 16. Thus, complainant has failed to establish that it is not the proximate cause of the actual status of the remaining cars, and that it properly notified in writing the other originating road-haul carriers of its car assignment request.

Upon reconsideration of the present record in this proceeding, we find that demurrage charges in the amount of $7,200 assessed by defendant A&BB railroad against complainant PPG on the 11 Penn Central covered hopper railcars during January 1973 to April 1973 are applicable, but have been shown to be unjust and unreasonable in violation of section 1 of the act for that amount in excess of the $5 per car per day storage charge as prescribed in Car Service Order No. 1112. We further find that demurrage charges in the amount of $8,450 assessed by defendant A&BB railroad against complainant PPG on the 28 remaining covered hopper railcars in question are applicable, and have not been shown to be unjust, unreasonable, or otherwise unlawful.

And we further find that this decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

It is ordered, That the initial decision and order served May 28, 1976, be, and it is hereby, vacated and set aside.

And it is further ordered, That demurrage charges assessed on 11 Penn Central cars are waived in the amount of $5,875, and that this proceeding be, and it is hereby, discontinued.

EX PARTE NO. 327

RATE INCENTIVES FOR CAPITAL INVESTMENT

Decided May 23, 1977

Upon investigation, proposed standards and expeditious procedures to promote the filing of incentive rates for railroad and nonrailroad capital investment amended in part and adopted as Part 1109.20 of Title 49 of the Code of Federal Regulations.

Harry J. Breithaupt, Jr., Charles W. Burkett, Martin L. Cassell, Frank S. Farrell, Joseph D. Feeney, Richard M. Freeman, Percey W. Johnston, Philip M. Lanier, C. George Neibank, Jr., Charles C. Rettberg, Jr., C. Barry Schaefer, John S. Shannon, James L. Tapley, and *John S. Walker* for participating railroads.

William R. Allen, Jr., Don A. Boyd, Robert L. Calhoun, John M. Cleary, L. F. Dinda, Jr., John F. Donelan, Thomas D. Donis, Howard Gould, William Harding, James J. Irlandi, William J. Keating, John H. King, Rodman Kober, James S. Krzyminski, C. R. Looney, Paul G. McQuiston, Bayard Marin, Edward M. Miller, John K. Masser III, L. A. Parish, William R. Rubbert, David Reichert, David M. Schwartz, William K. Smith, Stephen D. Strauss, John P. Tucker, Jr., W. Randall Tye, Mary McGuire Voog, and *Maxwell W. Wells, Jr.,* for interested shippers and shipper associations.

Constance L. Abrams, Donald T. Bliss, and *William A. Kutzke* for United States Department of Transportation.

Robert P. Kane and *Gordon P. MacDougal* for the Commonwealth of Pennsylvania.

John S. Fessenden for Water Transport Association.

REPORT OF THE COMMISSION

BY THE COMMISSION:

Congress enacted the Railroad Revitalization and Regulatory Reform Act of 1976, Public Law 94-210 (4R Act) in order "to provide the means to rehabilitate and maintain the physical facilities, improve the operation and structure, and restore the financial stability of the railway system of the United States, and to

best copy available

promote the revitalization of such railway system, so that this mode of transportation will remain viable in the private sector of the economy and will be able to provide energy-efficient, ecologically compatible transportation services with greater efficiency, effectiveness, and economy." To encourage capital investment and thus assist in the rehabilitation and revitalization of the railway system, Congress has enacted section 206 of the 4R Act. This new section governs the publication of railroad rates based on a capital investment of $1 million or more, individually or collectively by a carrier or by a shipper, receiver, agent thereof, or an interested third party. The full text of section 206, amending the Interstate Commerce Act by adding a new provision, section 15(19), is set forth in appendix A.

By Notice of Proposed Rulemaking and Order (NPRO)[1] entered July 27, 1976, and published in the Federal Register on August 3, 1976 (41 F.R. 32434), this proceeding was initiated to develop standards and expedited procedures to promote the filing of capital incentive rates. We indicated in the NPRO that it appears preferable to adopt regulations under the new section 15(19) of the act, rather than permit uncertainty to exist for an extended period of time while rules, standards, and procedures are developed on a case-by-case basis. All common carriers by railroad subject to part I of the Interstate Commerce Act were made respondents to this proceeding, and all interested parties were invited to participate. Appendix B lists the full and abbreviated names of parties submitting statements.

The NPRO was intended to elicit constructive comments for the development of workable regulations implementing an innovative statutory section. Although the final regulations are based on the original version in form, scope, and goals, the statements and replies presented in this proceeding were used extensively in developing the final regulations. Issues raised by the participants but not specifically discussed herein or reflected in the final regulations have been considered, but discussion and resolution thereof has been found unnecessary. The proposed regulations have been modified as warranted to comply with the constructive comments presented by the parties. We recognize that the regulations herein adopted may, as experience is gained, warrant refinement and modification. Accordingly, we will hold this proceeding open. Parties and concerned persons may petition for further modification if changes are believed necessary.

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[1] A copy of the Notice of Proposed Rulemaking and Order is set forth in appendix A hereto.

DISCUSSION AND CONCLUSIONS

Congress enacted section 15(19) as incentive for encouraging large capital investment necessary to serve railroad customers' needs better. Under prior law the possibility existed that such investment might be inhibited by the prospect of protracted administrative and court proceedings involving the rate schedules predicated upon large-scale initiatives. The procedures outlined in section 15(19) and the regulations which are the subject of this proceeding are designed to provide investors with an expeditious determination of the lawfulness of schedules on which their investment projects depend.

Once approved, a capital incentive rate may not be declared unlawful for a period of 5 years following the date it becomes effective. Involved parties are thus assured the certainty they require to predict the effect upon their operations of a major investment plan in the earlier years of its implementation. By facilitating the publication of rates for specific services that would fully utilize the railroads' equipment and provide the expected return on investment, section 15(19) creates an atmosphere conducive to large capital investment.

The parties to this proceeding generally support the concept of capital incentive rates and the procedures set forth in the proposed rules. Several of the parties, however, have expressed concern that the rules do not explain in greater detail the several criteria for applicability of section 15(19). We shall attempt in this report to provide some guidelines as to the types of eligible investments, the parties to whom proposed rates may apply and other related questions. In view of our inability to foresee all of the circumstances which may arise, the discussion of these issues is not intended to be exhaustive.

A number of parties have lodged objections concerning allocation of the burden of proof, adequacy of the notice requirement, and contents of the carrier's affidavit. In addition, several parties have taken positions with regard to the carrier's ability to change or cancel a capital incentive rate and the duration of the tariff. These objections and others, some of which have resulted in modification of the proposed rules, will be discussed subsequently. We believe that the procedures prescribed and the conclusions announced will permit the accomplishment of the congressional purpose in a fair and practicable fashion.

Congress has expressly determined that capital incentive rates require a total capital investment of $1 million. The statements of the parties raise a number of issues concerning the types of qualifying investments. Several of the parties request an explicit statement of permissible investments and argue interpretations of varying breadth. DOT believes that "eligible investment should be construed as broadly as possible, and should include any investment in rail-related plant, equipment or facilities * * *." DOT would include the following among investments likely to be made by shippers: (1) railroad cars, containers for use in rail operations; (2) railroad sidings, industrial spurs and related investment; (3) loading or unloading equipment designed primarily for use in conjunction with railroad movements; (4) storage and warehousing facilities designed primarily to take advantage of railroad services; (5) location of new plant or facilities in locations permitting the firm to take advantage of railroad services; and (6) investment in railroad right-of-way to allow continued or improved service to the shipper or receiver.

DOT would include the following among investments likely to be made by railroads: (1) track improvement, including rebuilding or building to handle heavier cars needed by particular shippers; (2) acquisition of special or general-purpose cars dedicated to specific shippers; (3) development of loading or unloading facilities; and (4) any other investments specifically designed to benefit a particular shipper. NITL and the railroads note that the language of section 15(19) contains no restrictions on the type of capital investment as long as other specified conditions are met. They caution against limiting the potential scope of this language, which inevitably will be developed on a case-by-case basis. Union Equity and ISIS request a statement of the extent to which investments may stray from distinctly railroad and shipping facilities. The Southern Companies and General Mills argue against the nonrestrictive concept advocated by the railroads since the main purpose of section 15(19) is to provide incentive for the improvement of rail facilities and services.

To limit the effect of section 15(19) by formulating an exclusive list of permissible investments is inadvisable. The ensuing commentary will hopefully provide involved parties with some guidance in this area.

A declared policy of the 4R Act is to:

> foster competition among all carriers by railroad and other modes of transportation, to promote more adequate and efficient transportation services, and to increase the attractiveness of investing in railroads and rail-service related enterprises.

Section 15(19) provides incentive for large-scale investment made pursuant to a single, verifiable plan. A schedule proposed under the section must relate closely to such investment. Thus, the investment should have a reasonably direct effect upon the rail transportation service to which the proposed capital incentive rate applies. Ordinarily, eligible capital investment will be for the purpose of promoting innovative or improved service or attracting new traffic. Investment devoted to the preservation of existing levels of service, as for the repair or maintenance of a railroad's general equipment and facilities, in most instances could not be associated with a particular rate modification or new rate; such investment would not be within the purview of section 15(19).

The aforementioned examples tendered by DOT generally are in accordance with the intent of section 15(19). Investment in the equipment and facilities referred to would be sufficiently related to rail service and could be associated with a rate modification or new rate. However, items (5) and (6) in DOT's list of likely shipper investments require qualification. Item (5) could be interpreted to include an investment in a shipper's general plant, which would not affect rail service except in the sense that rail transportation to the plant would depend upon the existence of the plant. We agree with the view expressed by General Mills that the mere investment of the requisite amount in a coal mine, a milling facility, or a factory would not of itself qualify unless accompanied by a shipper or carrier investment in rail-service related facilities. Generally only the portion of plant cost devoted to rail-oriented facilities, such as spur tracks, rail loading docks, and warehousing dedicated to rail, would be considered in determining whether the investment met the $1 million threshold. Item (6) in the DOT list of likely shipper investments appears too broad, since it encompasses investment which would not have the impact upon specific rail service required to implement a new or changed rate. A shipper, or, for that matter, a railroad investment devoted to rebuilding the main line of a rail line served by many originating or terminating shippers could not ordinarily serve as the basis for rate modifications affecting the multitude of traffic over the main line. However, certain shipper or railroad investments in rail right-of-way clearly are of the type envisioned by the new legislation. A shipper investment in heavier rail between its origin and connection to the main line for the purpose of accommodating heavier carload shipments is an appropriate example. By enabling its carriers to provide heavy-loading incentive rates, the shipper could reduce its transportation costs through investment in innovative rail service. Section 15(19) could apply to upgrading tracks on branch lines, spur tracks, long sidings, or even portions of main line, where the improvements are directly identified with specific traffic and associated with a rate modification or new rate.

General Mills asks the Commission to distinguish between (1) those railroad or nonrailroad capital investments involving specific traffic and rates applicable thereto of the railroad(s) on whose lines the investment takes place, and (2) capital projects that affect the general run of the investing railroad(s) business, *e.g.*, a new yard or track rehabilitation program. General Mills argues against the application of section 15(19) to comprehensive or particular investment projects of great magnitude, which would affect all or substantially all of the involved railroads' traffic. The distinction drawn between these two types of investment is a relevant one. We agree that systemwide rate modification predicated upon major investment affecting traffic generally was not contemplated as within the scope of section 15(19). The expedited procedures prescribed in section 15(19) and in the regulations herein adopted were not intended to accommodate a proceeding in the nature of a general rate increase. Only capital investment projects having an identifiable effect upon specific traffic would satisfy the requirement of a nexus between the investment and the implementation of the proposed schedule. A consideration of the features of section 15(19), including the immunity provision and the endorsement of collective investment, indicates that it was designed to create a favorable climate for parties interested in the betterment of specific rail service to reach mutually beneficial solutions through investment.

Underlying the 4R Act is the recognition that capital requirements for revitalization are so great that the railroads, alone, are unlikely to be able to meet them. Accordingly, eligible investments may be made "*** individually or collectively, by such carrier, or by a shipper, receiver or agent thereof, or an interested third party." DOT has requested clarification of this language, adopted verbatim from section 15(19), insofar as it describes each of the classes of potential investors in the singular. We believe that this usage does not evidence an intent to restrict collective investment to only one member of each class. The possibility of collective investment provides interested parties with the flexibility they require to effectuate innovative investment projects. We anticipate investments jointly made by two or more shippers, as well as by shipper and carrier. The individual investment of an interested third party is effectively a joint investment in the circumstance of an organization, such as a trade association, investing in behalf of more than one of its members. It follows that a single qualifying investment may supply the basis for a number of capital incentive rates. Where this is the case, there must be a close relationship between the investment and the particular traffic to which each rate modification or new rate filed under section 15(19) applies.

General Mills asks for comment on the extent to which rates involving noninvesting railroads should be permitted under section 15(19). To illustrate the problem it offers the situation of a railroad which intends to make the requisite investment and proposes a joint capital incentive rate with a railroad which will not participate in the investment project. General Mills contends, and we generally agree, that such an arrangement is appropriate for section 15(19) procedure. The publication of joint rates facilitates the assessment and collection of charges for transportation on the lines of participating carriers. Investing railroads should be permitted to propose joint capital incentive rates, which otherwise comply with the requirements of section 15(19), though their connecting carriers may not join in the specific investment. This determination allows the preservation of existing tariff structures and enhances the attractiveness of the section by enabling investing parties to enjoy the advantages of joint-rate publication.

DOT raises a question concerning the status of shippers and receivers to which a section 15(19) capital incentive rate may apply. DOT maintains that the filing railroad should be permitted to apply the tariff only to those parties actually making the investment or for whose benefit the investment is made, or to those parties to whom the investing parties wish to extend the rate, and not to other parties located in the same geographic area, even though they may be shipping similar goods at the same time. NITL, Archer, and Dreyfus disagree with this position, the latter two parties arguing that in order to avoid anticompetitive results, a schedule should be amendable to include other parties in similar transportation conditions who are able to take advantage of the rates, whether or not such parties have made any additional capital investment. The Southern Companies submit that capital incentive rates may be implemented only upon shippers and receivers which directly benefit from the capital improvements funded by the investment. Section 15(19) seeks to encourage large capital investment through the provision of rate incentives. Its application is, therefore, limited to proposed rates which require a capital investment of $1 million or more for their implementation. Clearly, proposed rates applicable to traffic unaffected by an appropriate investment would not qualify for section 15(19) procedure. If, however, an investment substantially affected the traffic of a noninvesting party, that party could be included in the section 15(19) proposal. Illustratively, where an investment by one of two shippers on a branch line would improve rail service to both, the investing shipper may agree to have the railroad extend the proposed, reduced section 15(19) capital incentive rate to the noninvesting shipper. The investing shipper would normally ascertain whether the railroad intended to make the rate available to the noninvesting party prior to making the commitment to invest. Having considered (a) the possible disadvantage of extending the rate to a noninvesting party that competes with the shipper, and (b) the alternative of having a competing noninvesting party pay a higher rate, justified by the fact that the noninvesting party does not incur investment outlays, the investing shipper that agreed to extend the rate to a noninvesting party would have taken account of the main drawbacks to such an arrangement. The section 15(19) proposal could not apply to a shipper not served by the branch line, since each rate modification or new rate proposed must depend upon the requisite investment. For purposes of this discussion it is important to recognize that rates not based on $1 million investment are subject to other sections of the act. Section 15(19) does not preclude railroads from filing schedules, whether or not eligible for section 15(19) procedure, under section 15(8) of the act. Rates so filed would, of course, be subject to normal investigation and suspension procedures. Thus, section 15(8) permits the filing of competitive rates by noninvesting railroads. If, in the above example, the noninvesting shipper were not included in the section 15(19) proposal, it would have the opportunity to protest and have the lawfulness of the proposal determined prior to the approval of the schedule.

GPC and the Southern Companies object to the failure of the proposed regulations to accommodate the many parties having made substantial investments within the past few years. As correctly pointed out by NITL and DOT, rate incentives are for the purpose of stimulating future capital investment and, therefore, are to be related to new proposals. Dreyfus and Parish express concern that previously investing shippers will be placed at a competitive disadvantage since they may not be in a position to make additional investments and the railroads may fail to extend them a competitive rate. Section 15(19) represents a congressional determination of a fair and effective means of inducing badly needed capital investment in rail transportation. The extent to which its benefits are unavailable to previously investing parties, or to small shippers unable to invest $1 million is a function of the balancing of interests inherent in the legislative process. Moreover, it is far from clear that the operation of section 15(19) will in fact disadvantage such parties. Although small shippers may be without the means individually to make the requisite investment, they may receive the benefit of capital incentive rates through joint investment, or investment of an interested third party, such as a governmental entity.

The flow of nonrailroad capital generated by section 15(19) will in all likelihood free railroad capital for investment accruing to the benefit of small shippers. In some instances large investment will lessen the burden on a railroad's existing equipment and facilities, permitting improved or innovative service to its smaller customers. The effect upon previously investing shippers of exclusion from section 15(19) procedure would appear to be less pronounced than portrayed by several of the parties. That a prior investment was made, reflects a business judgment on the part of the shipper that it would derive some benefit therefrom, perhaps in the form of reduced transportation costs or in increased productivity associated with investment in innovative service. The Southern Companies propose that the regulations be amended to require recognition of past shipper and consignee investments as a prerequisite for railroad imposition of a rate increase based on additional capital improvements. Regardless of the validity of this claim that the present rate structure does not reflect past investment by the Southern Companies, it is a condition with which the essentially procedural section 15(19) was neither intended, nor is equipped, to deal. Furthermore, the imposition of this blanket requirement might diminish railroad incentive for future investment in contravention of the purposes of the section. The requirements of section 15(19) do, however, assure against capital incentive rates based on railroad investment which is duplicative of previous shipper investment or otherwise superfluous. Any investment required to implement a proposed schedule must substantially affect the rail service to which the schedule applies. In order to serve as the basis for an increased capital incentive rate, an investment would have to engender some service benefit to involved parties.

Several parties ask that the regulations contain standards for judging the lawfulness of section 15(19) proposals. Shipper groups, such as ISIS and Southern Hardwood, urge the Commission to include safeguards against the potentially destructive, competitive effects of the section upon small shippers. ISIS perceives the threat of favoritism or monopoly leading to the annihilation of nonparticipating shippers. Union Equity and Dreyfus fear that the entry of new competition into an area having a capital incentive rate will be discouraged, unless the railroad is bound to negotiate with other parties for the extension of a similar capital incentive rate. Southern Hardwood and Southeastern Lumber think it conceivable that rail carriers would permit the deterioration of equipment for certain traffic in order to implement capital incentive rates selectively. Union Equity queries whether a proven giant in an industry could invest $1 million jointly with a railroad in hopper cars and thereby receive special rates to the exclusion of other shippers, whether or not in competition. The comments of the WTA indicate its attitude that the Commission should take into account the impact of capital incentive rates upon intermodal competition. In its reply statement DOT points out that consideration of intermodal competitive impact would contravene section 205 of the 4R Act and the policy of that act to "foster competition among all carriers by railroad and other modes of transportation," as expressed in section 101(b)(2). DOT further contends that the competitive effect upon shippers and receivers is relevant with regard to alleged violations of sections 2, 3 or 4 of the Interstate Commerce Act only in cases where the protestants have made similar investments during the same time period and face other similar transportation conditions. Archer argues against conclusively restricting the scope of Commission review to the situation described by DOT. Archer maintains that, although similar investments during the same time frame may warrant consideration as similar transportation circumstances and conditions, DOT's proposal in effect annuls all other prevailing conditions and circumstances which may bear on an issue of unlawfulness.

Section 15(19) rate proposals are subject to challenge under sections 1, 2, 3, or 4 of the Interstate Commerce Act prior to becoming effective. Nothing in section 15(19) purports to change substantively the traditional criteria by which determinations of unlawfulness are made. We perceive no fundamental inconsistency between the policies underlying section 15(19) and other sections of the Interstate Commerce Act. Section 15(19) provides shippers and receivers with the opportunity to show that proposed capital incentive rates would adversely affect their competitive posture. The consideration accorded to evidence of competitive impact will, of course, vary with the circumstances of each case. The point is that the section preserves existing safeguards against destructive competitive practices, since a meaningful investigation of the lawfulness of a proposed schedule must be conducted upon request. We do not deem it appropriate for purposes of this proceeding to make general pronouncements concerning challenges to capital incentive rates. Certainly, the fact that a party engages in a major investment project has some bearing upon the circumstances and conditions under which that party transports commodities. However, we shall not undertake to define the extent to which such differences justify differences in rate levels. The development of the substantive law in this regard is better left to the analysis of concrete situations in light of policy and precedent, which is characteristic of a case-by-case approach. Inasmuch as section 15(19) proposals are subject to protest under other sections of the Interstate Commerce Act, it follows, for example, that proposed rates may not be found unjustly and unreasonably high without a finding of market dominance under the regulations adopted in Ex Parte No. 320.[2]

A number of parties object to the allocation of the burden of proof to the protestant in a capital incentive rate proceeding. National Coops state that since capital incentive rate proposals are distinguishable from ordinary rate requests only by the presence of a 5-year period of protection from findings of unlawfulness, absent specific direction from Congress, there is no basis for circumventing the long established body of case law placing the burden of proof in rate cases upon the carrier seeking to justify the lawfulness of a rate change. National Coops, NITL and other parties argue that under the time frame imposed in these proceedings it is imperative that the carrier, which possesses most of the relevant facts, be made to present them for consideration at the earliest possible time. The assignment of the burden of proof to the carrier would require it to assemble the necessary data in advance of filing the notice of intention. Otherwise, a shipper will have only 30 days after filing a protest to prepare a case in which he must sustain the burden of proof. National Coops insists that the present regulations impose an intolerable burden upon protestants, particularly small shippers with little or no access to the required information.

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[2] Section 15(9) of the Interstate Commerce Act requires a determination of market dominance by the Commission within 90 days after the commencement of a proceeding to investigate the lawfulness of a rate challenged as being unreasonably high. Parties are advised to submit evidence bearing on the issue of market dominance, where relevant, in their initial statements under the procedure set forth in these regulations

Southern Hardwood, Southern Companies, Dreyfus, and others argue that the shift in the burden of proof not only presents a highly impractical change in ratemaking procedure, since the railroads possess the financial data and other information needed to evaluate a rate proposal, but also effectively renders a capital incentive rate proposal incontestable. They argue that the proposed shift contravenes the well-established principle of judicial and administrative procedure that the burden is placed upon the party having control of an access to the information necessary to resolve the issues in dispute. The Southern Companies contend that the proposed rule erects a procedural barrier to consignee and shipper participation in the ratemaking process with the inequitable result of eliminating opposition to incentive rate proposals from the shipping public which must pay the increased rates and charges. They urge the Commission to preserve the due process of a protestant in a section 15(19) proceeding.

The railroads challenge the contention of some shippers that the information needed to prove unlawfulness is solely in the hands of the carriers. The railroads emphasize that evidence of discrimination, preference and prejudice and violations of the long-haul-short-haul clause necessary to prove unlawfulness under sections 2, 3, or 4 of the act is readily available or obtainable by the shippers, and that evidence of comparative rates is set forth in published tariffs. Moreover, the railroads observe that the asserted impact of rates on shipper marketing practices is peculiarly within the knowledge of would-be protestants and not the carriers, and, that information in possession of the carriers may be obtained through the Commission's discovery procedures after an investigation is instituted.

Some of the shippers argue that section 15(7) places the burden of proof upon the proponent of a capital incentive rate. However, section 15(7) by express provision of the 4R Act no longer applies to railroads. New section 15(8)(f) allocates the burden of proof to the proponent carrier "in any hearing under the section." The railroads urge that the allocation of the burden of proof in section 15(8) does not apply to section 15(19) proceedings. Similarly, DOT and General Mills note that section 15(19) is by its terms applicable "notwithstanding any other provision of law." DOT thus maintains that capital incentive rate proposals have been exempted from the procedural requirements applicable to other types of rates. General Mills suggests that many of the rates filed under section 15(19) will be for new services and could properly be considered initial rates. The burden of proof in proceedings involving initial rates has been held to be upon protestants. *Animal Feed, Miss. and Tenn. to Midwest and Southwest*, 319 I.C.C. 257, 259-60 (1963). We agree with General Mills that those objecting to the assignment of the burden of proof do not distinguish between the burden of proof, as such, and the burden of persuasion as those distinctions are discussed in *Great Northern Ry. Co. Discontinuance of Service*, 307 I.C.C. 59 (1959), where the Commission stated at page 61:

> Regardless of where the burden of proof lies, a carrier subject to our regulation is expected to aid in the disposition of proceedings to which it is a party by making available all pertinent facts within its knowledge.

In our recent report on further consideration in Ex Parte No. 320, *Special Procedures for Making Findings of Market Dominance*, served October 1, 1976, we stated at page 6:

> A clear distinction should be drawn between the burden of proof in the sense of the burden of persuasion and the burden of producing evidence. The requirements contained herein impose on all parties the burden of producing certain available evidence in a limited number of situations in which they may not have the ultimate burden of persuasion. As we have pointed out in the Interim Report, the party best able to present particular evidence should do so in each proceeding in order to foster informed Commission decisions in all proceedings involving market dominance ***. The burden of proof in any proceeding is merely the burden of persuading the finder of fact that the interpretation of evidence urged is correct.

It is apparent that the preceding paragraph simply restates what has been a longstanding practice before this Commission and the courts, i.e., that the party best able to present particular evidence should do so in order to foster informed decisions.

In our NPRO in this proceeding, served July 29, 1976, we based our conclusion that protestants have the burden of proof on section 556 of the Administrative Procedure Act (APA), 5 U.S.C. 556, which establishes the general rule that the proponent of a rule or order has the burden of proof and the fact that since a proposed capital incentive rate will become effective automatically absent a prior Commission finding of unlawfulness, it must be the protestant who is seeking an order from the Commission. We are not persuaded that the arguments in opposition to the assignment of the burden of proof to protestant have any merit. Section 15(19), a new and innovative addition to the Interstate Commerce Act, is silent on the subject of burden of proof. On the basis of section 556 of the APA and the fact that a capital incentive rate cannot be prevented from being filed unless the Commission makes a specific finding of unlawfulness, we believe the burden of proof must remain on the protestant. The legislative history of the 4R Act indicates that section 15(19) was intended to provide incentives for large capital investments by permitting long-term rates which could be approved through an expedited procedure. A stated purpose of the 4R Act is to increase the attractiveness of investing in railroads and rail-service-related enterprises. In view of the evident purpose to create an atmosphere conducive to capital investments to improve the quality of rail service, we agree with DOT that placing the burden of proof on the carriers proposing capital incentive rates would clearly thwart congressional policy. Accordingly, the burden of proof will remain on protestants.

The WTA and Parish advocate requiring carriers operating under section 15(19) rates to report annually to the Commission the volume of traffic and the cost of performing service under each capital incentive rate, as well as the contribution of each rate to the railroad's going-concern value. They contend that this information is essential to the Commission in discharging its responsibility under section 15(19) to order capital incentive rates increased, if found to reduce the going-concern value of the carrier. The railroad respondents argue that Congress did not intend to bury them under a mountain of annual cost studies on every rate, whether or not opposed, and that necessary information could be acquired in the course of an investigation authorized upon petition or complaint. Proposed regulation 1109.20(h)(1) provides for continuing Commission jurisdiction to ensure that capital incentive rates are maintained at levels at least equal to variable costs. The reporting of volume and cost data clearly would facilitate effective monitoring and proper adjustment of capital incentive rates by the Commission. However, this information may be useful or necessary in some cases and not in others. We are not convinced that the need for the data justifies imposing an across-the-board annual reporting requirement. If the incentive to invest under section 15(19) is to be preserved, the procedural burdens attendant upon employment of this section should not be increased unnecessarily. In the course of exercising our functions under section 1109.20(h)(1) we shall, when appropriate, order the production of volume and cost data pertaining to section 15(19) rates. It is expected that filing carriers will perform such recordkeeping as is necessary to comply with a Commission request for information on reasonable notice.

Parish, Florida Canners, and Florida Growers propose measures to protect the shipping public in the event that rail carriers which have increased rates under section 15(19) in connection with an "anticipated capital investment," in fact, fail to make the investment as anticipated. It is suggested that the Commission withhold approval of capital incentive rates until the expenditure has been made. An alternative solution involves requiring the carrier to report periodically on the status of the anticipated investment. If after 6 months no investments have been made as anticipated, or no new traffic has developed, Parish proposes that the rate automatically expire. The parties have raised a problem which warrants consideration. Congress cannot have intended to accord investing parties the benefits of the section, when, for some reason, the actual investment does not substantially comply with the anticipated investment upon which the schedule is based. This circumstance could not ordinarily arise, since capital incentive rates would be associated with an investment in innovative service. If the investment were not made, the schedule geared to the new service could not be implemented. However, the possibility exists that in certain cases actual expenditures may fall far below the $1 million threshold for application of section 15(19) incentives. In some cases an investment project might undergo material and fundamental changes prior to completion. It would be unfair to extend a guaranteed lifetime to schedules which received approval under section 15(19) on the basis of a description differing substantially in character from the finished project. We therefore affirm our inherent power under section 15(19) to reexamine capital incentive rates in instances in which the actual investment fails to meet the criteria for section 15(19) applicability or differs materially from the investment as described in the initial filing to the prejudice of the rights of interested parties. Should the Commission determine that, in light of the changed nature of the actual investment, the proposed schedule would not have been approved, we may order the expiration of the rate. Carriers should not be obligated to report periodically the status of the investment. Such information will not be useful in the great majority of cases. Many large-scale projects are sufficiently visible that their progress may be monitored. The Commission may request status reports if necessary.

On October 19, 1976, the "Rail Transportation Improvement Act," (RTIA) P.L. 94-555, was signed into law. Effective October 1, 1976, it includes certain technical amendments to the Interstate Commerce Act, as amended by the 4R Act. Section 220(m) of the RTIA provides:

> The final sentence of Section 15(19) of the Interstate Commerce Act (49 U.S.C. 15(19)) "is amended by striking out Section 2" and inserting in lieu thereof "Section 1, 2".

The effect of the newly enacted amendment is to extend to capital incentive rates protection from attack under section 1, subject to the exception contained in the final sentence of section 15(19). Final regulation 1109.20(h)(2) has been modified to reflect this change.

Section 1109.20(h)(2) of the proposed regulations precludes reopening of the proceeding for consideration of alleged violations under certain sections of the act. Pennsylvania and Archer feel that this language renders uncertain the permissibility of a shipper protest of a nonsection 15(19) rate alleging unlawfulness with respect to the relationship between the protested rate and an existing section 15(19) rate. The regulations have no effect whatsoever upon the rights of interested parties to petition for suspension of and to protest schedules not filed pursuant to section 15(19). Although the lawfulness of capital incentive rates may not be drawn into question for 5 years, the Commission will, as always, consider properly alleged violations of the act with respect to other rates. Rate comparisons with capital incentive rates will be considered in light of surrounding circumstances and conditions.

Garvey and Parish recommend that the regulations establish a maximium effective period of 5 years for section 15(19) rates. DOT correctly states that the duration of these tariffs is unlimited by section 15(19), and that the long effective lifetime of investments made under the section may indeed mitigate in favor of the tariffs lasting beyond 5 years. Clearly, protection against sections 1, 2, 3, and 4 challenges expires after 5 years. No convincing rationale has been presented for automatically limiting the life of section 15(19) tariffs without regard for the preferences of affected parties. Where deemed appropriate, an expiration date may be included in proposed schedules. Final regulation 1109.20(b)(3) requires the filing carrier to state in the affidavit accompanying the notice of intention whether or not an expiration date for the tariff has been predetermined. If an expiration date has not been fixed, the carrier should estimate the likely duration of the schedule for purposes of the 1109.20(b)(3) summary.

A number of parties have raised the subject of cancellation of a section 15(19) schedule during the 5-year period. Most of the commenting parties correctly recognize that the proposed regulations do not prohibit a filing railroad from canceling a capital incentive rate before 5 years have elapsed. FMC, Dreyfus, GPC, and National Grain argue that the protection of investing shippers and third parties requires that the regulations enjoin cancellation for 5 years. It is suggested that cancellation exposure may retard nonrailroad investment mutually advantageous to carriers and shippers. Dreyfus points out that contractual provisions against cancellation between investor and carrier may not sufficiently protect the former, since in the event the carrier goes into receivership, an investor may be relegated to his rights as a general creditor.

As previously stated, section 15(19) rates are not intended to have a fixed duration of 5 years. The multiplicity of investment arrangements and types of investments contemplated under the section will necessarily result in tariffs of varying beneficial lifetimes. It is true that in almost all cases the useful life of the investment would be no less than 5 years. Congress determined that the incentive of a 5-year period during which capital incentive rates were protected from involvement in proceedings and findings of unlawfulness would substantially encourage capital investment. The possibility of cancellation of a capital incentive rate during the 5 years might significantly diminish this incentive to invest. Unless potentially investing shippers and third parties can be guranteed the certainty they require, the congressional purpose may be defeated. However, the imposition of a uniform prohibition against cancellation might dissuade certain investors from utilizing section 15(19). The railroad respondents' opposition to the noncancellation measure is surely grounded in the desire to retain a modicum of ratemaking flexibility to meet changed circumstances. Ordinarily section 15(19) investments will have been prudently made, and the issue of cancellation should not arise. If railroads were prevented from canceling capital incentive rates, they would in some instances be required to keep a rate in effect that was not accomplishing its purpose. Where a rate is based on an investment made solely by the filing railroad, there is little justification for depriving the carrier of its business judgment with respect to the continuance of the service. Furthermore, a rigid prohibition against cancellation might prove an obstacle to the mutual accommodation of potential participants in joint investment projects. A noncancellation provision, while preserving section 15(19) incentives for investing shippers, could operate as a disincentive to the filing railroads, which must agree with any plan. The preferable alternative is to allow the affected parties themselves to reach satisfactory arrangements as to the matter of cancellation. In many cases filing carriers will recognize and accede to the legitimate security needs of investing parties by including a tariff provision barring cancellation for a stated period. Certain shippers or third parties might choose to invest in the absence of such a provision, or have their concerns alleviated through other means. In the interest of maximizing investment under section 15(19), we believe that the opportunity for individual solutions to the problem should not be foreclosed. However, adequate protection of investing parties necessitates that the record contain a binding statement by the filing carrier on the subject of cancellation of capital incentive rates. Accordingly, proposed regulation 1109.20(b)(2) has been modified to require the railroad to state at the outset whether or not the tariff will contain a provision barring its cancellation for a specified period of time.

In the event a railroad retains the right to cancel a capital incentive rate, section 1109.20(h)(2) would not immunize a proposed cancellation from protest. The proposed cancellation would be subject to investigation and suspension by the Commission in accordance with the procedures set forth in section 15(8) of the Interstate Commerce Act.

DOT suggests that the regulations be modified to preclude a section 15(19) rate from becoming effective until the fruits of the investment have been realized sufficiently to allow shippers to make use of them. It is true that in some instances a portion of the 5-year guaranteed immunity may be lost to construction time or on account of other delays. All proposed schedules, whether or not investigated, need not become effective for 210[3] days following service of the order authorizing publication. It is, therefore, anticipated that in few cases will time constraints impair the investing parties' incentive to undertake the project or to execute it in the most beneficial manner. In the interest of providing involved parties with reasonable certainty as to the effective date of the proposed schedule, obviating the employment of a vague standard based on the stage of completion of the facility, and ensuring that the effective date of the tariff is not unduly remote from the conclusion of the investigation, we subscribe to the use of the 180-day limitation period, as expressly set forth by Congress in section 206 of the 4R Act.

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[3] Upon a Commission determination that a section 15(19) proposal is lawful, section 1109.20(f)(2) provides for the issuance of an order authorizing the filing on 30 days' notice of a tariff incorporating the proposal. The filing may be accomplished at any time within 180 days after service of the order.

Southern Hardwood and Southeastern Lumber request a statement in the regulations that carriers using section 15(19) procedure are not relieved from compliance with the provisions of their section 5b agreements respecting rate proposals. Since capital incentive rates are for specialized rail service, they are not likely to involve collective ratemaking action. Section 15(19) does not affect the obligations of parties to 5b agreements. It is not necessary to treat this matter in the regulations.

The respondent railroads propose as an editorial change the substitution of the word "Protestant's" for "Complainant's" in the last sentence of section 1109.20(e)(2). They also recommend the revision of section 1109.20(e)(3) to make clear the statutory requirement that a determination of lawfulness be made within the 180-day period following the date of filing of the notice of intention. The final regulations reflect these changes.

Parish believes that the inclusion of the applicable docket number in section 15(19) tariff provisions would be extremely helpful to involved parties. Regulation 1109.20(g) has been modified to comply with this request.

Garvey proposes eliminating the requirement of 1109.20(d) that the protest contain a statement of the grounds for the requested investigation. We feel that the inclusion of a concise statement describing the nature of the violations protestant will attempt to show at hearing would aid the expeditious determination of the lawfulness of a proposed schedule. A hearing is mandatory upon duly filed request. For this reason we reject DOT's suggestion that section 1109.20(d) require protestants to provide information sufficient to establish the Commission's authority to review the level of section 15(19) rates.

Several shipper groups caution that mere Federal Register publication of a section 1109.20(b)(3) summary would prejudice the numerous small shippers who do not have access to that publication. Proposed forms of supplemental notice range from ublication in trade journals to a requirement of direct notice from ailroads to individual shippers. The respondent railroads argue that ederal Register publication is adequate notice and that Congress id not intend to impose extraordinary procedural requirements. In iew of the statutory time limitations on section 15(19) proceedings, we recognize a legitimate need for some additional notice. It would ot unduly burden the railroads to require the publication of a ection 1109.20(b)(3) summary in one transportation trade publication of general distribution within a reasonable time following the date of filing the notice of intention. Section 1109.20(c) has been modified to require such supplemental publication.

General Mills asks whether and to what extent subsequent ex parte general increases would be applicable to section 15(19) rates. It points out that the regulations do not comment on the permissibility of carrier-initiated increases of section 15(19) rates, other than Commission-ordered increases to a level equaling variable costs. General Mills recognizes that railroads commonly exempt specialized service rates which involve the dedication of new equipment or facilities from ex parte increases. However, should the railroads seek to apply ex parte increases to section 15(19) rates, General Mills would not object if the increases were otherwise justifiable. The railroad respondents argue that an approved capital incentive rate is part of the general rate structure to which ex parte general increases should later be allowed to apply without forfeiting the protection accorded to the underlying rate by section 15(19). Dreyfus, however, contends that the section would be of no value as an incentive to investment, were the Commission to permit carrier increases of capital incentive rates under circumstances other than that described in the last clause of section 15(19).

While section 15(19) protects capital incentive rates from findings of unlawfulness and accords the Commission a limited power of revision, it does not expressly enjoin filing carriers from increasing or reducing rates during the 5-year period. We are not convinced that the congressional purpose to encourage capital investment requires denying carriers the right to adjust the levels of rates filed under section 15(19). Carriers understandably would be reluctant to utilize section 15(19) if their sechedules as filed were unalterable for 5 years, except if found to reduce going-concern value. Neither the record in this proceeding nor recent economic trends support the proposition that carrier costs will remain unchanged over a number of years. There is little justification for a rule curtailing the ability of the railroads to protect their own investments, which in many cases would form the exclusive basis for capital incentive rates. An important policy consideration underlying the 4R Act is the broadening of carrier responsbility over rate levels. A measure which would fix rate levels for 5 years should be adopted only if necessary to ensure the viability of section 15(19). If potentially investing shippers and third parties can secure adequate protection against unanticipated increases by their filing carriers, these regulations need not restrict the methods by which rate adjustments may be sought. Since the utilization of section 15(19) is voluntary, shipper and third-party participation in investment projects will depend upon the availablity of terms mutually acceptable to them and to the filing railroads. The extent to which section 15(19) rates may be adjusted in the future is likely to be a major concern of all involved parties. Shippers and third parties can protect their interests by ascertaining, prior to making an investment commitment, the methods of rate adjustment the railroads will employ.

Potential investors may determine in advance whether or not the application of ex parte general increases would be a satisfactory means of adjusting section 15(19) rates. In the event these parties feel that the equipment and capital costs applicable to a systemwide rail operation would not be attributable to specialized service based on shipper or third-party capital investment, they could negotiate with the railroads to have the capital incentive rates exempted from general increase proceedings. If, on the other hand, the application of ex parte increases were deemed appropriate, such investors would have the opportunity to participate in the general increase proceeding for the purpose of determining the extent of the increase to be authorized. As an alternative to the application of ex parte general increases, parties may prefer to predetermine a formula for rate adjustment based on indexes which more accurately reflect the cost of providing the specific service.

The protection of investors does require that any such agreeement be clearly stated on the record and that it bind the railroads during the 5-year period. Accordingly, section 1109.20(b)(2) of the proposed regulaitons has been modified to require that the sworn affidavit state whether or not the proposed rates will be exempted from future ex parte increases and the terms of any agreement relating to the subsequent adjustment of rates.

It should be pointed out tnat, in the absence of prior agreement, railroads may publish increased or reduced capital incentive rates without forfeiting the protection section 15(19) accords to the underlying, approved rate. This situation will most commonly arise where a capital incentive rate is based on an investment made exclusively by a railroad. Section 15(19) does not, however, impair the rights of interested parties and the Commission under section 15(8) to cause proposed changed rates to be investigated and suspended. To the extent changed, capital incentive rates may be found unlawful during the 5-year period, except if changed pursuant to Commission order for the purpose of increasing rates to a variable cost level. We do not agree with General Mill's view that proposed increases of capital incentive rates should be reviewable under the 180-day procedure provided for in section 15(19). That procedure is designed to accommodate original proposals of schedules closely tied to specific investment projects. The purposes of section 15(19) do not require a departure from the procedures generally applicable to proposed rate changes.

Section 1109.20(b) describes the notice of intention and accompanying documents the filing of which initiates section 15(19) procedure. DOT suggests the addition of the following information to that required by proposed paragraph (b): the identities of all parties to whom the proposed rate is to be available; the amounts and nature of investments of those parties and the concurrence in the proposed rates by the investing parties; and sufficient economic data to show that the proposed rates are reasonable given the railroad contributions to the investment NITL contends that the sworn affidavit should contain the information necessary for at least a prima facie conclusion as to the lawfulness of the proposed schedule. Specifically, it suggests the inclusion of such information as: (1) details of the anticipated investment, by whom made, the cost of the capital involved, et cetera; (2) the variable costs to the railroads of providing the proposed service (a) without the proposed capital investment, and (b) with the proposed capital investment; (3) comparable rates, fares, charges, classifications, regulations, or practices on other traffic presently or prospectively moving, particularly that on the same commodity in the same general territory under the same or comparable transportation conditions but not restricted to the precise conditions such as annual volumes, trainload movements, et cetera.

WTA believes that the sworn affidavit must include a description of the traffic involved, including a showing of the proponent's present traffic volume, if any, and the volume anticipated under the proposed rate. If the proposed rate would have an intermodal competitive impact, WTA would require information permitting cost comparisons with rates for similar movements in the same area. Finally, WTA requests data establishing the variable costs of performing service under the proposed rate as of the effective date. WTA contends that the foregoing information is essential to a meaningful determination of lawfulness.

Dreyfus proposes the addition of a subsection which would require evidence justifying the proposed rate in terms of economics and/or efficiencies, as well as an analysis of the detrimental impact on other parties not benefiting from the rate. Dreyfus maintains that the submission of an economic impact statement with the notice of intention would facilitate a party's decision whether or not to file a protest.

FMC feels that section 1109.20(b)(2) should be modified to provide for the filing of the sworn affidavit by either the involved carrier, shipper, receiver, or third party. Since there may be more than one party to a proposed investment, NITL believes the regulations should contemplate the filing of more than one affidavit. Parish seeks assurance that the attachments which accompany the notice of intention are considered part of the application and available to the public.

The respondent railroads strongly oppose any required advance justification or overly detailed submissions. They contend that the statutory purpose of section 15(19) to stimulate capital investment through the lessening of evidentiary burdens and institution of expedited procedures will be frustrated if parties supporting a proposed schedule must make such a showing even before an investigation has been instituted.

Much of the above-described information may be essential to the determination of lawfulness of particular tariff proposals. However, we do not believe that carriers should be made to provide all of this information with the notice of intention. The requirement of an economic impact statement would unnecessarily burden the proponent in the many cases in which the lawfulness of the tariff was not disputed. Moreover, an interested person's decision to protest a proposed schedule is not likely to depend on the early availablity of this detailed information. Such evidence as appears relevant may be adduced at a later stage in the proceeding. As noted in the discussion of the burden of proof in section 15(19) proceedings, a party is bound to produce evidence if the ability to do so rests exclusively with that party. We, therefore, feel that the submission of justification statements at the outset will not enhance the effectiveness of challenges to proposed tariffs.

Rules 1109.20(b)(2) and (g) have been modified to incorporate additional requirements which we deem important but not onerous. In accordance with DOT's suggestions, the final regulations require that the proposed tariff and the affidavit state the names of shippers and/or receivers eligible to tender freight under the capital incentive item, and that the affidavit state the name and contribution of each investing entity. The affidavit further requires estimates of the variable costs per unit of service under the proposed schedule. This information permits the determination of whether the proposed rate is at least equal to variable cost. We anticipate that carriers will have undertaken some analysis of the costs associated with the new service prior to filing under section 15(19). The inclusion of this cost data in the affidavit would not unduly burden the proponent.

Finally, the affidavit requires carriers to explicitly affirm and state the substance of any predetermined arrangements concerning the expiration, cancellation or adjustment of capital incentive rates. The rationale for each of these requirements has already been discussed in detail. We feel that the disclosure of any agreement or the lack of agreement on matters which could well affect the security and business judgment of participants in a section 15(19) proceeding will assist such parties in the protection of their interests. Furthermore, the inclusion of these agreements in the record binds the filing carrier.

Since the filing provided for in section 1109.20(b) is essentially a rate application, we believe that parties other than the filing carriers should not be required to file affidavits. A section 15(19) proposal will for convenience be assigned a formal docket number upon receipt of the notice of intention. Accompanying documents will be filed and available for public inspection in the same manner as in other proceedings. However, a proceeding will be formally commenced only if a protest is filed.

Although FMC asks what confidentiality we will afford to the information contained in the sworn affidavit, it does not indicate which kinds of data may require secrecy. As stated, revised rule 1109.20(b)(2) requires that the sworn affidavit list all the parties to whom the schedules are available, and the name and amount of contribution of each investing party. Also, it must contain an estimate of the variable costs per unit of service under the proposed schedules. The record is devoid of any reason why this material should be accorded the cloak of confidentiality, especially when no tax information is involved. Compare docket No. 36126, *Confidential Annual Report Supplement for Class I Carriers and Revision to the Railroad Annual Report* (not printed), decided by the Commission on April 9, 1976.

Several of the parties suggest that we remove from section 1109.20(b)(3) the term "railroad" as it modifies "facility" because this language seemingly precludes capital investment in the facilities of shippers or third parties though they are related to the involved rail service. Since investment under section 15(19) is not limited to distinctly railroad facilities, we are persuaded that the term should be removed.

National Grain suggests that we provide an expedited discovery procedure in the regulations with provision for extended time where a carrier is dilatory in producing relevant data. General Mills believes that given the limited time frame mandated by Congress, many potential problems could be avoided by requiring a greater amount of railroad disclosure at the outset. The extent of the information required to accompany the notice of intention has been fully discussed, *supra,* at pages 28 to 31. We recognize that the statutory purpose of section 15(19) to stimulate capital investment would be frustrated if the parties were required to submit extensive, advanced justification as suggested by a number of parties. We have modified rule 1109.20(b)(2) to incorporate additional disclosure requirements which we deem to be important but not excessively burdensome to the proponent.

The Commission's Revised Rules of Practice, Ex Parte No. 55 (Sub-No. 24), decided April 28, 1977, stress the need for discovery to be accomplished in sufficient time for parties to meet established dates for hearing or for the submission of initial statements under the modified procedure. Discovery must be accomplished in sufficient time for parties to meet established dates for hearing or for the submission of initial statements under the modified procedure. These rules are intended to follow Federal court procedure to the extent possible in light of this Commission's mission and peculiar circumstances and recognize the necessity for strict time limitations to combat administrative lag and to insure compliance with legislatively imposed deadlines.

In Ex Parte No. 322, *Expeditious Handling of Division's Revenue Cases,* decided July 29, 1976, we indicated that in formulating discovery regulations we have to balance carefully our obligations to handle divisions of revenue cases expeditiously with our responsibility to adhere to basic concept of due process, and we cautioned that the unrestricted use of discovery could be used to defeat the intended purpose of the new legislation. In view of the severe time constraints imposed by Congress in section 15(19) proceedings, it is imperative that parties conclude the discovery process, when necessary, in sufficient time to permit the filing of statements on the dates set forth in these regulations. In view of the severe time constraints imposed by Congress, discovery will be permitted only when deemed necessary.

The respondents propose that section 1109.20(f) be revised to permit the Commission the option of making a "without prejudice" finding or order, as an alternative to simply prohibiting a proposed schedule found partially unlawful. We agree that in the appropriate case carriers should be allowed to modify and resubmit proposals within a reasonable time in compliance with Commission conclusions in the first proceeding. The resubmitted proposal would be approved if found to conform to the "without prejudice" order. Present regulation 1109.20(f) does not preclude "without prejudice" findings or orders setting forth procedures for the resubmission of proposals. It is, therefore, unnecessary to modify the regulations for that purpose.

The Commission will instruct the Bureau of Traffic to examine all tariffs filed pursuant to the Commission's approval of any proposal made in compliance with the rules adopted herein. The Bureau will insure that such tariffs are also brought into compliance with the appropriate provisions of our rules which govern the construction, posting, and filing of tariffs (49 CFR 1300).

NITL opposes the 25-day time limiation of section 1109.20(d) on the ground that the information upon which a protest is based cannot be gathered and analyzed in the time provided. It requests a 45-day period from the date of Federal Register publication within which to file a protest. The respondents support the existing regulation.

Section 15(19) requires that capital incentive rate proceedings be concluded no more than 180 days following the filing of the notice of intention. Furthermore, a Commission investigation is obligatory upon the request of any interested person. The protest need contain only an undetailed statement of the grounds for the requested investigation. We believe that 25 days is sufficient time for interested persons to determine whether there exists any basis for a finding of unlawfulness. The period of time allotted by the proposed rules exceeds by 7 days the time within which a verified complaint must be filed with respect to tariff changes not filed under the provisions of section 15(19) of the act.

The 4R Act was intended by Congress to accord railroads a greater range of freedom in the setting of rate levels. If creatively and responsibly exercised, this mandate can improve the financial health and competitive posture of the railroads, with the ultimate benefit enuring to the public. Whether this opportunity will be fully utilized depends upon the ability of the railroads, shippers, and Commission to make the adaptations necessary to permit these innovative policies to be fairly tested.

If section 15(19) is to achieve its purpose of encouraging large-scale capital investment in rail-related facilities, railroads, shippers, and other potential participants in investment projects must work closely together to reach mutually beneficial solutions. We believe that the final regulations as adopted herein will facilitate a spirit of cooperation. In view of the particularly innovative nature of section 15(19), and the far-reaching impact the implementation of these regulations may have, we recognize that these final rules may require revision in light of actual experience. Accordingly, this proceeding will remain open.

An appropriate order will be entered.

APPENDIX A

NOTICE OF PROPOSED RULEMAKING AND ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D.C., on the 27th day of July 1976.

EX PARTE NO. 327

RATE INCENTIVES FOR CAPITAL INVESTMENT

Congress has declared as its purpose in enactment of the Railroad Revitalization and Regulatory Reform Act of 1976, Public Law 94-210, (4 R Act) "to provide the means to rehabilitate and maintain the physical facilities, improve the operations and structure, and restore the financial stability of the railway system of the United States, and to promote the revitalization of such railway system, so that this mode of transportation will remain viable in the private sector of the economy and will be able to provide energy-efficient, ecologically compatible transportation services with greater efficiency, effectiveness, and economy." In order to encourage capital investment and thus assist in the rehabilitation and revitalization of the railway system, Congress has enacted section 206 of the 4 R Act. This new section governs the publication of railroad rates based on a capital investment of $1 million, or more, individually or collectively, by a carrier, or by a shipper, receiver, agent thereof, or an interested third party. The full text of section 206, amending the Interstate Commerce Act by adding a new provision, section 15(19), is set forth in appendix A.

To promote the filing of rates based on capital investment of $1 million or more, it appears preferable to adopt regulations under the new section 15(19) of the act rather than permit uncertainty to exist for an extended period of time while rules, standards and procedures are developed on a case-by-case basis. Accordingly, the regulations here proposed for adoption are designed to encourage the filing of capital incentive rates by facilitating publication and by establishing expedited procedures to resolve controversies associated with the filing of rates based on a capital investment of $1 million or more.

DISCUSSION OF THE PROPOSED REGULATIONS

The provisions of section 15(19) of the act have limited applicability. New railroad rate filings that do not involve a capital investment of $1 million or more are subject to other sections of the act. Only those railroad tariff proposals based on a capital investment of $1 million or more are subject to the special requirements of section 15(19) of the act. For this reason, the first regulation proposed for adoption, 1109.20(a), limits the application of the remainder of the regulations here proposed for adoption to rates based on a capital investment of $1 million or more. A finding under section 15(19) and the proposed procedures is optional; a carrier may elect to take advantage of the new statutory provision or it may file a capital incentive rate under section 15(8), subject to normal investigation and suspension procedures.

Although Congress could have provided that capital incentive rates might be filed with the Commission 30 days in advance of their effective dates, as is the usual procedure for rate changes pursuant to section 6 of the act, Congress instead provided that the actual filing of a capital incentive rate must be preceded by the filing of a "notice of intention to file a schedule stating a new rate***." This notice must be filed so as to allow the Commission a "180-day period following the filing of such notice of intention" to determine whether "the proposed schedule, or any part thereof, would be unlawful." To assure that a decision on the merits, in the event of protest, can be rendered in the 180-day period the proposed regulation 1109.20(b) provides:

(1) That two copies of the proposed tariff be submitted with the notice of intention to file, one copy of which will be placed on file and remain available for public inspection in the Public Tariff File, Room 6217, of the Interstate Commerce Commission, Washington, D.C.;

(2) That a sworn affidavit setting forth in detail the anticipated capital investment accompany the notice; and

(3) That the carrier prepare and submit a summary, suitable for publication in the Federal Register, containing relevant data upon which a concerned person can form an informed judgment on whether to protest the proposal.

Proposed regulation 1109.20(c) provides that notice of a carrier's proposal to file a capital incentive rate shall be given to concerned persons by publication of a summary of the proposal in the Federal Register.

Protests, if any, must be filed 25 days after the date of publication of the summary in the Federal Register [proposed regulation 1109.20(d)]. Section 15(19) directs that, if a protest is filed, the Commission must conduct a hearing. This requirement of a mandatory hearing, in the event of protest, is implemented by proposed regulation 1109.20(e).

Proposed regulation 1109.20(e)(1) places the burden of proof on protestant. Section 15(19) states, "[u]nless *** the Commission determines *** that the proposed schedule, or any part thereof, would be unlawful, such carrier may file the schedule ***." Thus, a capital incentive rate cannot be prevented from being filed unless the

Commission makes a definite finding of unlawfulness based on substantial evidence on the record as a whole.

Section 556 of the Administrative Procedure Act, 5 U.S.C. 556, establishes the general rule that the proponent of a rule or order has the burden of proof. Since a proposed capital incentive rate will become effective automatically absent a prior Commission finding of unlawfulness, it must be the protestant which is seeking an order from the Commission. Consequently, the protestant must have the burden of proof.

The remaining proposed regulations provide that, with respect to all filings under section 15(19), the Commission will enter an order either authorizing or prohibiting the publication of capital incentive rates [proposed regulation 1109.20(f)] and for the reopening to consider going-concern value [1109.20(h)(1)] and to consider violations of sections 2, 3, or 4 of the act after the incentive rate has been in effect for a 5-year period [proposed regulation 1109.20(h)(2)].

The regulations (proposed regulation 1109.20(g)] require that a tariff provision implementing a capital incentive rate must indicate that the rate has been established in accord with these special procedures [(proposed regulations 49 CFR 1109.20(a) *et seq.)*] and make reference to the Commission order authorizing the publication of that capital incentive rate.

Wherefore, in order to provide opportunity for full consideration of the proposed rules previously discussed and set forth in appendix B hereto, and any related matters:

It is ordered, That a proceeding be, and it is hereby, instituted under the authority of section 206 of the Railroad Revitalization and Regulatory Reform Act of 1976 (P.L. 94-210), the Interstate Commerce Act (49 USC 15(19)), and the Administrative Procedure Act (5 U.S.C. 553 and 559) with the objective of encouraging capital investment in railroad facilities by facilitating the publication of new rates based on capital investment of $1 million or more, individually or collectively, by a carrier, shipper, receiver, agent, or interested third party.

It is further ordered, That all common carriers by railroad subject to part 1 of the Interstate Commerce Act, be, and they are hereby, made respondents in this proceeding.

It is further ordered, That any person interested in this proceeding shall notify this Commission by filing with the Office of Proceedings, Interstate Commerce Commission, Room 5342, Washington, D.C. 20423, on or before August 23, 1976, the original and one copy of a statement of intent to actively particpate. The Commission shall then prepare and make available to all such persons a list containing the names and addresses of all parties desiring to participate in this proceeding and upon whom copies of all statements must be filed. No oral hearing will be scheduled for the receiving of testimony unless a need therefor should later appear.

It is further ordered, That following the preparation of the service list, a procedural order will be entered designating due dates for submission of evidence and arguments.

And it is further ordered, That a copy of this notice be served on each respondent, that a copy be deposited in the office of the Secretary, Interstate Commerce Commission, Washington, D.C., for public inspection, and that statutory notice of the institution of this proceeding, be given to the general public by delivery of a copy thereof to the Director, Office of the Federal Register for publication therein.

Section 15 of the Interstate Commerce Act is amended by adding at the end thereof the following new paragraph:

RATE INCENTIVES FOR CAPITAL INVESTMENT

(19) Notwithstanding any other provision of law, a common carrier by railroad subject to this part may file with the Commission a notice of intention to file a schedule stating a new rate, fare, charge, classification, regulation, or practice whenever the implementation of the proposed schedule would require a total capital investment of $1 million or more, individually or collectively, by such carrier, or by a shipper, receiver, or agent thereof, or an interested third party. The filing shall be accompanied by a sworn affidavit setting forth in detail the anticipated capital investment upon which such filing is based. Any interested person may request the Commission to investigate the schedule proposed to be filed, and upon such request the Commission shall hold a hearing with respect to such schedule. Such hearing may be conducted without answer or other formal pleading, but reasonable notice shall be provided to interested parties. Unless, prior to the 180-day period following the filing of such notice of intention, the Commission determines, after a hearing, that the proposed schedule, or any part thereof, would be unlawful, such carrier may file the schedule at any time within 180 days thereafter to become effective after 30 days' notice. Such a schedule may not, for a period of 5 years after its effective date, be suspended or set aside as unlawful under section 2, 3, or 4 of this part, except that the Commission may at any time order such schedule to be revised to a level equalling the variable costs of providing the service, if the rate stated therein is found to reduce the going-concern value of the carrier.[1]

REGULATIONS PROPOSED

TITLE 49 - TRANSPORTATION
CHAPTER X - INTERSTATE COMMERCE COMMISSION
SUBCHAPTER B - PRACTICES AND PROCEDURES
PART 1109 - REQUIREMENTS AND PROCEDURES RELATING TO RAILROAD REVITALIZATION AND REGULATORY REFORM ACT OF 1976
SECTION 1109.20 - REQUIREMENTS AND PROCEDURES RELATING TO RATE INCENTIVES FOR CAPITAL INVESTMENTS

Section 1109.20—*Requirements and special procedures relating to rate incentives for capital investment.*

(a) *Applicability.* The provisions of this part apply only to railroad proposals for a new rate, fare, charge, classification, regulation, or practice that requires a total capital investment of $1 million or more, individually or collectively, by such carrier, or by a shipper, receiver, or agent thereof, or an interested third party. These proposed rates are hereinafter referred to as capital incentive rates.

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[1] On October 19, 1976, following the service date of the Notice of Proposed Rulemaking, section 15(19) of the Interstate Commerce Act was amended by the Rail Transportation Improvement Act as follows: "The final sentence of Section 15(19) of the Interstate Commerce Act (49 U.S.C. 15(19)) is amended by striking out 'Section 2' and inserting in lieu thereof 'Section 1, 2'."

(b) *Notice of intention*. A notice of intention to file a schedule containing a capital incentive rate must be filed in advance of the filing of the actual tariff by the carrier (or its agent) electing to use the special procedures adopted pursuant to section 15(19). This notification, an original and seven copies, shall make reference to Ex Parte No. 327, and shall be accompanied by the following documents:

(1) Two copies of the proposed tariff, one copy of which will be received and remain available for public inspection in the Public Tariff File, Room 6217, of the Interstate Commerce Commission, Washington, D.C.

(2) A sworn affidavit setting forth in detail the anticipated capital investment upon which such filing is based.

(3) A summary suitable for publication in the Federal Register. The summary shall include the name of the entity proposing to make the capital investment, the anticipated amount of the capital investment, the nature of the railroad facility to be augmented, improved, or constructed, the commodity or commodities to be transported, the proposed duration of the capital incentive rate, the name and address of the responsible carrier official or representative to whom inquiries and request for documents relating to the proposal should be addressed, and a statement that a copy of the proposed tariff is available for public inspection in the Public Tariff File, Room 6217, of the Interstate Commerce Commission, Washington, D.C.

(c) *Federal Register publication*. The Commission will, as soon as practicable, cause a summary of the proposal to be published in the Federal Register.

(d) *Protest*. Within 25 days from date of publication in the Federal Register, any interested person, hereinafter referred to as protestant, seeking a hearing on the proposed capital incentive rate must so inform the Commission and the carrier official or representative identified in the Federal Register. An original and seven copies of this notification, hereinafter referred to as a protest, must be filed with the Commission and shall make reference to Ex Parte No. 327, the date of publication of the summary in the Federal Register, and the grounds for the requested investigation.

(e) *Hearing*. Upon the receipt of a protest, the Commission by order will immediately schedule a hearing to commence 30 days from service of the order.

(1) *Burden of proof*. In any hearing pertaining to a capital incentive rate the burden of proof shall be upon the protestant.

(2) *Procedural dates*. Protestant's initial presentation, in written form under modified procedure (unless oral hearing is directed), shall be due 30 days from service of the Commission order instituting the proceeding. The reply statement of the carrier (respondent) or any interested party shall be due 20 days thereafter. Complainant's rebuttal statement shall be due 20 days after the filing of the reply statement.

(3) *Postponement of procedural dates*. In view of the statutory requirement that hearings be concluded within a 180-day period following the notice of intention to file a capital incentive rate, postponement of the procedural dates established by these regulations is not contemplated. Request for postponement, if received later than 10 days before the due date, will not be accepted for filing.

(f) *Orders authorizing or prohibiting the publication of capital incentive rates*. With respect to every capital incentive rate proposal, the Commission shall enter an order either authorizing the publication of the actual tariff on 30 days' notice or prohibiting the publication of such rate.

(1) *Noninvestigated proposals.* An order shall be entered 35 days after publication of the summary in the Federal Register authorizing the tariff publication on 30 days' notice of the noninvestigated capital incentive rate. This authorization order shall be valid for a 180-day period and, if not exercised within that period, the order shall be of no further force or effect.

(2) *Investigated proposals.* (i) If, after hearing, the Commission finds that the capital incentive rate proposal is lawful, it will enter an order or report and order giving reasons for its conclusion and authorizing the filing on 30 days' notice of a tariff incorporating the proposal. This authorization, if not exercised, shall expire 180 days after service of the order.

(ii) If, after hearing, the Commission finds that the capital incentive rate proposal is unlawful, it will enter an order or report and order giving reasons for its conclusions prohibiting the publication of a tariff implementing the proposal.

(g) *Notation in tariffs or schedules.* Tariff provisions implementing capital incentive rates shall contain the following notation:

> Provisions named herein authorized by Commission order served June 8, 1977, and in conformity with 49 CFR 1109.20.

(h) *Reopening.* (1) The Commission shall retain jurisdiction to order that the capital incentive rate be increased to a variable cost level in the event the capital incentive rate is found to reduce the going-concern value of the carrier.

(2) For a period of 5 years following the date a capital incentive rate becomes effective, the proceeding shall not be reopened for consideration of alleged violations of sections 2, 3, or 4 of the act. Similarly, the schedules may not be set aside in a complaint proceeding as unlawful under sections 2, 3, or 4 within 5 years after the effective date of the incentive rate publication.

APPENDIX B

Parties filing opening and reply statements

Garvey, Inc. (Garvey)
General Mills, Inc. (General Mills)
Institute of Scrap Iron and Steel, Inc. (ISIS)
Railroads, members of the Association of American Railroads, sometimes called the respondents or the railroads
The National Industrial Traffic League (NITL)
United States Department of Transportation (DOT)
Water Transport Association (WTA)

Parties filing opening statements only

Alabama Power Company, Georgia Power Company, Gulf Power Company, and Mississippi Power Company (Southern Companies)
Commonwealth of Pennsylvania (Pennsylvania)
E.I. du Pont de Nemours and Company (Du Pont)
Florida Canners Association (Florida Canners) and Growers and Shippers League of Florida (Florida Growers)
FMC Corporation (FMC)
General Foods Corporation (General Foods)

Georgia-Pacific Corporation (Georgia-Pacific)
Grain Processing Corporation (GPC)
L.A. Parish Company (Parish)
Louis Dreyfus Corporation (Dreyfus)
National Council of Farmer Cooperatives (National Coops)
National Grain and Feed Association (National Grain)
PPG Industries, Inc. (PPG)
Southern Hardwood Traffic Association and Southeastern Lumber Manufacturers Association (Southern Hardwood) and (Southeastern Lumber)
Union Equity Co-operative Exchange (Union Equity)

Parties filing reply statements only

Archer Daniels Midland Company (Archer)

APPENDIX C

REGULATIONS ADOPTED

TITLE 49 - TRANSPORTATION
CHAPTER X - INTERSTATE COMMERCE COMMISSION
SUBCHAPTER B - PRACTICES AND PROCEDURES
PART 1109 - REQUIREMENTS AND PROCEDURES RELATING TO RAILROAD REVITALIZATION AND REGULATORY REFORM ACT OF 1976
SECTION 1109.20 - REQUIREMENTS AND PROCEDURES RELATING TO RATE INCENTIVES FOR CAPITAL INVESTMENTS

Section 1109.20—*Requirements and special procedures relating to rate incentives for capital investment.*

(a) *Applicability.* The provisions of this part apply only to railroad proposals for a new rate, fare, charge, classification, regulation, or practice that requires a total capital investment of $1 million or more, individually or collectively, by such carrier, or by a shipper, receiver, or agent thereof, or an interested third party. These proposed rates are hereinafter referred to as capital incentive rates.

(b) *Notice of intention.* A notice of intention to file a schedule containing a capital incentive rate must be filed in advance of the filing of the actual tariff by the carrier (or its agent) electing to use the special procedures adopted pursuant to section 15(19). This notification, an original and seven copies, shall make reference to Ex Parte No. 327, and shall be accompanied by the following documents:

(1) Two copies of the proposed tariff, one copy of which will be received and remain available for public inspection in the Public Tariff File, Room 6217, of the Interstate Commerce Commission, Washington, D.C.

(2) An original and seven copies of a sworn affidavit by the carrier proposing the schedule. The affidavit shall include a description of the new investment, the name and contribution of each entity proposing to make the investment, the names of all shippers and /or receivers eligible to tender freight under the capital incentive item, estimates of the variable costs per unit of service under the proposed schedule, a

statement indicating whether or not an expiration date for the proposed schedule has been predetermined, a statement indicating whether or not a restraint on cancellation of the proposed schedule has been predetermined and the nature of any such restraint, a statement indicating whether or not the proposed schedule is to be exempted from ex parte general increases, and a statement indicating whether or not a formula for adjustment of the proposed schedule has been predetermined and the nature of any such formula. A copy of the affidavit shall be sent to each entity joining in the capital investment.

(3) *A summary suitable for publication in the Federal Register.* The summary shall include the name of each entity proposing to make the capital investment, the anticipated amount of the capital investment, the nature of the equipment or facility to be augmented, improved, or constructed, the commodity or commodities to be transported, the proposed duration of the capital incentive rate, the name and address of the responsible carrier official or representative to whom inquiries and requests for documents relating to the proposal should be addressed, and a statement that a copy of the proposed tariff is available for public inspection in the Public Tariff File, Room 6217, of the Interstate Commerce Commission, Washington, D.C.

(c) *Federal Register and Trade Journal publication.* As soon as practicable, a summary of the proposal shall be published in the Federal Register by the Commission, and in one transportation trade publication of general distribution by the filing carrier (or its agent).

(d) *Protest.* Within 25 days from the date of publication in the Federal Register, any interested person, hereinafter referred to as protestant, seeking a hearing on the proposed capital incentive rate must so inform the Commission and the carrier official or representative identified in the Federal Register. An original and seven copies of this notification, hereinafter referred to as a protest, must be filed with the Commission and shall make reference to Ex Parte No. 327, the date of publication of the summary in the Federal Register, if known, and the grounds for the requested investigation.

(e) *Hearing.* Upon the receipt of a protest, the Commission by order will immediately schedule a hearing to commence 30 days from service of the order.

(1) *Burden of proof.* In any hearing pertaining to a capital incentive rate the burden of proof shall be upon the protestant.

(2) *Procedural dates.* Protestant's initial presentation, in written form under modified procedure (unless oral hearing is directed), shall be due 30 days from service of the Commission order instituting the proceeding. The reply statement of the carrier (respondent) or any interested party shall be due 20 days thereafter. Protestant's rebuttal statement shall be due 20 days after the filing of the reply statement.

(3) *Postponement of procedural dates.* In view of the statutory requirement that hearings be concluded and a determination of lawfulness made within a 180-day period following the date of filing of the notice of intention to file a capital incentive rate, postponement of the procedural dates established by these regulations is not contemplated. Request for postponement, if received later than 10 days before the due date, will not be accepted for filing.

(f) *Orders authorizing or prohibiting the publication of capital incentive rates.* With respect to every capital incentive rate proposal, the Commission shall enter an order either authorizing the publication of the actual tariff on 30 days' notice or prohibiting the publication of such rate.

(1) *Noninvestigated proposals.* An order shall be entered 35 days after publication of the summary in the Federal Register authorizing the tariff publication on 30 days'

notice of the noninvestigated capital incentive rate. This authorization order shall be valid for a 180-day period and, if not exercised within that period, the order shall be of no further force or effect.

(2) *Investigated proposals.* (i) If, after hearing, the Commission finds that the capital incentive rate proposal is lawful, it will enter an order or report and order giving reasons for its conclusion and authorizing the filing on 30 days' notice of a tariff incorporating the proposal. This authorization, if not exercised, shall expire 180 days after service of the order.

(ii) If, after hearing, the Commission finds that the capital incentive rate proposal is unlawful, it will enter an order or report and order giving reasons for its conclusions prohibiting the publication of a tariff implementing the proposal.

(g) *Notations in tariffs or schedules.* Tariff provisions implementing capital incentive rates shall contain the following notations:

> Provisions named herein authorized by Commission order served June 8, 1977, Docket No. Ex Parte No. 327, in conformity with 49 CFR 1109.20.

Tariff provisions shall further state if applicable, the name(s) of shippers and/or receivers eligible to tender freight under the capital incentive item.

(h) *Reopening.* (1) The Commission shall retain jurisdiction to order that the capital incentive rate be increased to a variable cost level in the event the capital incentive rate is found to reduce the going-concern value of the carrier.

(2) For a period of 5 years following the date a capital incentive rate becomes effective, the proceeding shall not be reopened for consideration of alleged violations of sections 1, 2, 3, or 4 of the act. Similarly, the schedules may not be set aside in a complaint proceeding as unlawful under sections 1, 2, 3, or 4 within 5 years after the effective date of the incentive rate publication.

ORDER

TITLE 49 - TRANSPORTATION
CHAPTER X - INTERSTATE COMMERCE COMMISSION
SUBCHAPTER B - PRACTICES AND PROCEDURES
PART 1109 - REQUIREMENTS AND PROCEDURES RELATING TO RAILROAD REVITALIZATION AND REGULATORY REFORM ACT OF 1976

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D.C., on the 23rd day of May 1977.

EX PARTE NO. 327

RATE INCENTIVES FOR CAPITAL INVESTMENT

It appearing, **That the Commission, by notice and order served July 29, [illegible]6, instituted this rulemaking proceeding under authority of section 206 of the Rai[illegible]d Revitalization and Regulatory Reform Act of 1976 (Public Law 94-210) to de[illegible]p standards and expeditious procedures to promote the filing of incentive rates [illegible]or railroad and nonrailroad capital investment pursuant to section 15(19) of the Interstate Commerce Act;**

It further appearing, That by said notice of proposed rulemaking all interested parties were invited to make representations with regard to the proposed rules; and that notice to all interested parties was given through publication in the Federal Register of August 3, 1976;

It further appearing, That the Commission, upon consideration of all the comments filed, has, on the date hereof, made and filed its report setting forth its conclusions, findings, reasons therefor, and its decision that the regulations set forth in appendix C thereof should be adopted, which report is hereby referred to and made a part hereof;

Wherefore, and for good cause:

It is ordered, That the Commission hereby adopts the regulations as set forth in said appendix C.

It is further ordered, That Part 1109 of Title 49 of the Code of Federal Regulations be, and it is hereby, amended by adding the regulations as set forth in said appendix C.

It is further ordered, That this order shall become effective on the date it is served.

It is further ordered, That this proceeding shall remain open, so that refinement and modification of adopted procedures may be made in the light of actual experience.

And it is further ordered, That notice of this order shall be given to the general public by depositing a copy in the Office of the Secretary of this Commission at Washington, D.C., and by filing a copy with the Director, Office of the Federal Register.

No. 36482

REFRIGERANTS OR DISPERSANT GASES, LOUISIANA & KENTUCKY TO CALIFORNIA

Decided May 23, 1977

Restrictive routing provisions in connection with reduced joint rates on refrigerants and dispersant gases from Baton Rouge, La., and Calvert, Ky., to El Segundo and south Anaheim, Calif., respectively, found to be lawful in all respects. Proceeding discontinued.

Charles W. Burkett and *John MacDonald Smith* for respondent.
Leland E. Butler and *Frederick G. Pfrommer* for protestant.

REPORT AND ORDER OF THE COMMISSION

DIVISION 2, COMMISSIONERS HARDIN, MURPHY, AND CLAPP

BY THE DIVISION:

The modified procedure was followed. Pursuant to section 15(8) of the Interstate Commerce Act, this proceeding has been assigned to this division for final disposition. Requested findings not specifically discussed in this report nor reflected in our findings or conclusions have been considered and found not justified or their resolution not necessary for appropriate disposition of this proceeding.

By schedules filed to become effective November 29, 1976, respondent, Southern Pacific Transportation Company (Southern Pacific), party to a tariff of Trans-Continental Freight Bureau (TCFB), Agent,[1] established reduced point-to-point carload commodity rates on liquid or gas refrigerants, in tank cars, of 130 and 126 cents,[2] minima 182,000 and 191,000 pounds, respectively, from Baton Rouge, La., to El Segundo, Calif., and 143 and 139 cents, minima 182,000 and 191,000 pounds, respectively, from Calvert, Ky., to south Anaheim, Calif. These rates are restricted to routing via Illinois Central Gulf Railroad Company (ICG) to New Orleans or Shreveport, La., thence Southern Pacific to destination. Upon protest of The Atchison, Topeka and Santa Fe Railway Company (Santa Fe), the schedules were permitted to become effective without suspension but were placed under investigation.

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[1] A jointly filed tariff designated as Trans-Continental Freight Bureau, Agent, Tariff 1-Y, I.C.C. 1925; Traffic Executive Association-Eastern Railroads, Agent, I.C.C. C-1088; Southern Freight Association, Agent, I.C.C. S-1308, supplement 99, on page 3, item 1541-E, part 3.

[2] Rates are stated in cents per 100 pounds at the Ex Parte No. 313 level.

Evidence in support of the schedules was submitted by Southern Pacific, in opposition by Santa Fe, and in reply by Southern Pacific. Under section 15(8) of the act, respondent has the burden of proof.

Southern Pacific has for a number of years handled carload movements of refrigerant and/or dispersant gases, in tank cars, to two receivers located on its lines in the Los Angeles Basin area of California. Refrigerant gases are commonly used in air-conditioning systems, and dispersant gases are used for aerosol purposes.

Approximately 4,000 tons per year originate at Allied Chemical Company at Baton Rouge and move to Allied Chemical's plant at El Segundo. ICG moves the traffic from Baton Rouge to New Orleans, where it is interchanged with Southern Pacific for movement to El Segundo. Approximately 2,500 tons per year also originate at Pennwalt Cehmical Company at Calvert and move to Pennwalt's facility at south Anaheim. ICG moves the traffic to Shreveport, La., where it is interchanged with the St. Louis Southwestern Railway Company for movement to Corsicana, Tex., where it is tendered to Southern Pacific for movement to destination. In both cases Southern Pacific received a long haul to the destination in California. The south Anaheim facility is served exclusively by Southern Pacific, while the Allied Chemical plant at El Segundo is physically served by both Southern Pacific and the Santa Fe. However, Santa Fe's tracks do not reach that portion of the plant at which the gases are unloaded, nor is there any interchange with respondent at this point. There is no interchange between Santa Fe and respondent at south Anaheim. Accordingly, Santa Fe can neither originate nor terminate the issue traffic but can only participate as a bridge carrier.

If Santa Fe were to perform the long-haul move, Southern Pacific's portion would be short hauls of 17 miles from Los Angeles to El Segundo and 30 miles from Los Angeles to south Anaheim.

El Segundo was formerly served by the Pacific Electric Railway Company (PE), a wholly owned and controlled subsidiary of respondent. Southern Pacific and PE were authorized to merge in *Southern Pac. Co. Merger,* 327 I.C.C. 38 (1964), with certain specified conditions discussed later.

Prior to June 15, 1976, the rate for liquid or gas refrigerants in tank cars from Baton Rouge to El Segundo was 193 cents, minimum 188,000 pounds, and from Calvert to south Anaheim 223 cents, minimum 188,000 pounds. In February 1976, Santa Fe proposed to TCFB reductions of 33 to 35 percent for tank car rates from Louisiana to California on, *inter alia,* the issue commodities. Respondent did not join in the proposal at that time because it felt the resulting revenues would be only marginal. These proposed reduced rates were to be published to the shipper's facilities at El Segundo and Pittsburg, Calif. Santa Fe exercised independent action and published the reduced rates. From Baton Rouge to El Segundo the reduction was trom 193 cents to 130 cents, minimum 182,000 pounds, and to 126 cents, minimum 191,000 pounds. The net reduction in railroad revenue per tank car was $1,262.40 and $1,279.70 on 188,000-pound and 191,000-pound shipments, respectively. Southern Pacific states that these reductions in revenue were not accompanied by any reductions in expenses, but that the reduced rates gave up one-third of the revenue on traffic which had been moving under the prior rates. Southern Pacific asserts that it continued to refuse to publish the reduced rates, both because of what it believed to be a very low revenue contribution from what had formerly been profitable traffic and also because of its concern that the low basis of rates initiated by the Santa Fe would spread and remove the profitability from other transcontinental westbound tank car movements. While the issue movements respresented only a portion of the rail traffic of those shippers in which respondent participated, Southern Pacific states that its refusal to publish the lower rates adversely affected the harmonious business relationships which it previously had with those shippers on various other traffic movements in the West and Southwest. Respondent explains it could no longer resist shipper pressure and thus published the lower level of rates.

Prior to the respondent's rate reductions, the Baton Rouge shipper was routing the issue commodities over the Santa Fe, using respondent as the delivering carrier under a freight-all-kinds rate maintained in Southern Pacific's California tariff on movements between Los Angeles and El Segundo.

As a result of its publication of the reduced rates, with its participation limited to long-haul routes, respondent foreclosed any Santa Fe effort to perpetuate the combination rate movement.

Respondent asserts that its routing restrictions are in compliance with certain conditions set forth in *Southern Pac. Co. Merger, supra.* Although El Segundo was formerly a station on the PE, respondent maintains that it has not violated the merger conditions, because, had the issue routing problem arisen before the merger, PE would have followed respondent's instructions to not join in the reduced rate. South Anaheim was not a PE station.

Protestant Santa Fe states that the restricted routing provision in issue eliminates previously opened California junction routings between the Southern Pacific and Santa Fe and also eliminates the gateways of El Paso, Tex., and Deming, N. Mex., closing out rates and through routes which had existed for many years. Santa Fe has set forth the mileages via the SP restricted routes as well as via the "normal tariff routes" with Santa Fe participation.

Santa Fe's route-mileage analysis

	Miles
Baton Rouge, La., to El Segundo, Calif.:	
ICG, New Orleans, Southern Pacific	2,098
ICG, Shreveport, Southern Pacific	2,190
Missouri Pacific, Sweetwater, Santa Fe, Deming, Southern Pacific	2,048
Missouri Pacific, Sweetwater, Santa Fe, Los Angeles, Southern Pacific	1,994
Calvert, Ky., to south Anaheim, Calif.:	
ICG, New Orleans, Southern Pacific	2,569
ICG, Shreveport, Southern Pacific	2,439
ICG, Kansas City, Santa Fe, Deming, Southern Pacific	2,320
ICG, Kansas City, Santa Fe, Los Angeles, Southern Pacific	2,285

Santa Fe regards the Southern Pacific routes as circuitous and the Santa Fe routes as shorter and more direct. It also points out that, what Southern Pacific characterizes as a short haul, was a long haul for the former PE.

Protestant alleges that Southern Pacific's actions violate the merger conditions in *Southern Pac. Co. Merger, supra,* where the

Commission required, *inter alia*, that certain routing conditions be maintained and that traffic and operating relationship then existing between PE and all lines connecting with its tracks were to be continued. By denying Santa Fe access to the previous gateways, it is alleged that Southern Pacific has violated the merger conditions similar to those the Commission has enforced in *Enforcement of Conditions in Merger Proceeding*, 313 I.C.C. 191 (1961), and *Rates, TOFC, Between Midwest & South—Louisville & N. R.*, 318 I.C.C. 40 (1962).

Santa Fe concludes that the restrictive routing has not been shown to be just and reasonable, since normal tariff routings previously applied and that, even in the absence of prior movement, the prior publications established that there were through routes which were commercially open.

In reply Southern Pacific emphasizes that there is no shipper protest and urges the conclusion that there will not be any adverse effect on the shippers. It is pointed out that Santa Fe did not claim it participated in the Baton Rouge-El Segundo traffic when El Segundo was a PE station; Southern Pacific's witness further states that to his knowledge Santa Fe participated in the Baton Rouge-El Segundo traffic only during the brief period when Santa Fe had the lower rate after its independent action. From these conclusions, Southern Pacific urges that there will be no adverse impact on Santa Fe. Respondent also relies on this lack of traffic participation by Santa Fe to question whether there can be a claim of technical violation of the merger conditions if protestant did not participate in the issue traffic when El Segundo was a PE station.

Southern Pacific denies Santa Fe's allegation that the issue routing restrictions disrupt the normal tariff routes. Respondent points out that the rates for the account of Santa Fe are applicable only through Arizona, where Santa Fe would receive line hauls of either 1,593 miles or 1,359 miles, depending on its gateway. If, however, the Arizona routing restriction were not published and the traffic were routed through Nevada, respondent calculates that the Santa Fe long haul would only amount to 35 miles. Southern Pacific concludes that, since "normal tariff routes" are not available, the transportation circumstances also justify respondent's restrictive routing.

DISCUSSION AND CONCLUSIONS

Under section 15(8) of the act, the burden of proof is upon respondent Southern Pacific. The principal issues are whether the routing restrictions are justified by the surrounding transportation circumstances and, if justified, whether the routing restrictions on the El Segundo rate violate the merger provisions of *Southern Pac. Co. Merger, supra.* The south Anaheim rate is not alleged to violate the merger conditions.

No issue is raised regarding the rate levels. However, shippers will presumably prefer to use respondent's services, since Santa Fe's service would require the use of a higher combination rate to effect delivery to El Segundo. As pointed out by Southern Pacific, the alternative is not between unrestrictive routing on the one hand and restrictive routing on the other; rather, it is between two routings, each of which is restrictive in its own manner to assure a long haul. An attempt to meet rates maintained by a competitive railroad that are subject to restrictive routing with reduced rates subject to a different restrictive routing does not constitute an unreasonable practice.

Under section 15(3) of the act the Commission is empowered to establish through routes and joint rates whenever it is deemed to be necessary or in the public interest. This power is limited by section 15(4), which prohibits the Commission from establishing through routes which would require a rail carrier to short-haul itself unless it is found that the lines of the carrier which is short hauled are part of an unreasonably long route as compared with another practicable through route or unless the through route proposed to be established is needed to provide adequate, and more efficient or economical, transportation. In *Thompson* v. *United States*, 343 U.S. 549 (1952), the Supreme Court emphasized that the purpose of section 15(4) is to bar the Commission from compelling railroads to establish through routes resulting in truckline short hauls without faithful observance of the restrictive conditions imposed by that section.

The record shows that the distances of the commercially available routes compare favorably with the closed routes. The lack of shipper protest indicates that the retained routes are sufficient to meet the needs of the shipping public and that the closed routes are not required to provide a more efficient or economical service. Indeed, Santa Fe's long haul would required at least one additional interchange. Protestant contends that what is a short haul to respondent is a long haul to the former PE. However, there is no dispute that respondent owned and controlled the PE prior to the merger; for all practical purposes, traffic destined to PE was

Southern Pacific traffic. See *Western Pac. R. Co.* v. *Northwestern Pac. R. Co.*, 191 I.C.C. 127, 132 (1933).

Although the parties have not addressed their testimony to section 15(3) as amended by the Railroad Revitalization and Regulatory Reform Action of 1976 (4R Act), our conclusions necessarily must reflect consideration of certain additional criteria. The 4R Act adds the additional sentence to section 15(3):

> With respect to carriers by railroad, in determining whether any such cancellation or proposed cancellation involving any common carrier by railroad is consistent with the public interest, the Commission shall, to the extent applicable, (a) compare the distance traversed and the average transportation time and expense required using the through route, and the distance traversed and the average transportation time and expense required using alternative routes, between the points served by such through route, (b) consider any reduction in energy consumption which may result from such cancellation, and (c) take into account the overall impact of such cancellation on the shippers and carriers who are affected thereby.

This addition clearly states that, regardless of the burden of proof placed on the parties, the Commission is obligated to examine the available evidence and make determinations as far as possible on the questions of comparative distance traversed, average transportation time and expense required, possible reductions in energy consumption and impact on affected carriers and shippers. See *Switching Charges at Port of Butte, Mont.*, 355 I.C.C. 835 (1977).

As the evidence shows, both respondent's and protestant's mileages for the issue traffic are substantially similar; the circuity factor by protestant's figures are less than 10 percent for the Baton Rouge-El Segundo traffic and about 13 percent for the Calvert-south Anaheim traffic. Although there is no evidence in the record in respect to costs, time to traverse the alternate routes, or energy consumption, we have concluded that any savings in time or energy could well be dissipated with the additional interchanges that would be required via protestant's lines. Likewise, shipper impact appears to be nonexistent; although the shippers are large corporations with sophisticated traffic departments, they have not participated in this proceeding. While it is somewhat more difficult to assess carrier impact on the basis of this record, we are of the opinion that overall there will be less adverse carrier impact under the subject rates than when an additional carrier's services are employed, especially when consideration is given to the greatly reduced level of rates.

In regard to the allegations of merger conditions violations, we noted that *Southern Pac. Co. Merger, supra,* has been reopened. While certain issues are similar in both proceedings, the commodities, origins, and destinations and other factual circumstances are sufficiently different as to preclude reliance on the merger proceeding to resolve the merger questions arising herein.

The routing restrictions on the El Segundo rate are alleged to violate conditions 1 and 3 of the Southern Pacific-PE merger. Condition 1 required respondent to "maintain and keep open all rates and channels of trade via existing junctions and gateways unless and until otherwise authorized by the Commission." Condition 3 required Southern Pacific to continue "the present traffic and operating relationships existing between the Pacific Electric Railway Company, on the one hand, and all lines connecting with its tracks, on the other * * *."

These conditions were sought by Santa Fe in the merger proceeding to protect (then) present routings and interchanges between itself and PE. *Southern Pac. Co. Merger, supra* at 39. The testimony of record demonstrates that while the routings were in existence at the time of the merger, they were not actively carrying the traffic under consideration herein. Protestant urges that the merger conditions be strictly enforced and cites in this regard *Enforcement of Conditions in Merger Proceeding, supra,* and *Rates, TOFC, Between Midwest & South—Louisville & N.R., supra.* Therein restrictive routings were found to violate merger conditions similar to those applicable to Southern Pacific. However, the above cases can be distinguished from the present circumstances because the traffic therein had been handled by other than the merged rail carriers; here, the Santa Fe did not handle the traffic until it took the independent rate action. Furthermore, the actions restricting routing in the other cases were unilateral by the merged carrier. Respondent's action herein was not unilateral in restricting the routing but was only in delayed response to the actions taken by the Santa Fe, which in turn, had in effect rates with restrictive routing.

We find the restrictive routing provisions in connection with reduced joint rates on refrigerants and dispersant gases, in tank cars, from Baton Rouge, La., and Calvert, Ky., to California destinations are shown to be in accordance with statutory provisions and are not in violation of the merger conditions in *Southern Pac. Co. Merger, supra.*

We further find that this decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

IT IS ORDERED, That this proceeding be, and it is hereby, discontinued.

NOTICE: By this report and order, due to statutory time limits, this proceeding is rendered administratively final pursuant to section 17 of the Interstate Commerce Act, as amended, and within the meaning of section 704 of the Administrative Procedure Act.

No. 36044

SOUTHERN CAR SERVICE, INC. v. THE WESTERN RAILWAY OF ALABAMA

Tariff charges assessed on the movement of empty tank cars since the effective date of the tariff (February 1, 1972) found not shown to have been unjust and unreasonable or otherwise unlawful. Complaint dismissed.

L. Drew Redden and *William N. Clark* for complainant.
Emried D. Cole, Jr. for defendant.

DECISION AND ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Review Board Number 4, Members *FitzPatrick*, *Shaw*, and *Fisher* (Board member *Shaw* not participating), held at its office in Washington, D.C., on the 23d day of January 1976.

Upon consideration of the complaint and record in the above-captioned proceeding, including: the initial decision of the Administrative Law Judge, served June 24, 1975, the exceptions filed by the complainant, July 22, 1975, and the reply by the defendant filed August 11, 1975; and

It appearing, That the Administrative Law Judge found that tariff charges assessed on the involved movements of empty tank cars since February 1, 1972 were not shown to be unjust, unreasonable, or otherwise unlawful;

It further appearing, That the Administrative Law Judge made the following subsidiary findings: that the agreements of the parties made before publication of the tariff will not be enforced, interpreted, or binding on the Commission when the lawfulness of the published rates is challenged; that the more specific item (Item 49) of the tariff was applicable; that the published charge of $25 each way permits defendant to cover its variable costs, and is otherwise just and reasonable; that complainant has not established that it is being discriminated against by having to pay defendant delivering railroad for transporting empty tank cars to its facility while other car cleaning facilities may not incur such a charge, because it has not established that the noncharging railroads are not receiving some benefit to compensate them for their expenditure of resources in delivering the car to the car cleaning facility; and that complainant has not established that his facility benefits defendant;

It further appearing, That the time to file for reconsideration of the order of Division 2, dated January 6, 1975, and served January 14, 1975, which denied complainant's motion to strike defendant's cost evidence and complainant's request for oral hearing and cross-examination of certain witnesses has expired, see *Mode-O-Day Corp.* v. *Atchison, T & S.F. Ry. Co.*, 325 I.C.C. 390, 392 (1965); and that complainant at no time raised any material issue of fact which warranted cross-examination or oral hearing;

It further appearing, That even if defendant's cost evidence were given no probative weight, complainant has not shown that the level of the assailed charge is unjust and unreasonable;

And it further appearing, That the exception do not show any material errors in the Administrative Law Judge's statement and evaluation of the facts, conclusions of law, and findings; do not raise any material matters of fact or law not adequately considered and properly disposed of by the Administrative Law Judge in his initial decision; and are not of such nature as to require the issuance of a report by Review Board Number 4 discussing the evidence submitted and the arguments advanced by the parties in light of the exceptions;

Wherefore, and good cause appearing therefor:

We find, That the evidence considered in the light of the exceptions and the reply thereto does not warrant a result different from that reached by the Administrative Law Judge; and that, as modified herein, the statement of facts, conclusions, and findings of the Administrative Law Judge, being proper and correct in all material respects should be, and they are hereby, affirmed and adopted as our own.

It is ordered, That in adopting the Administrative Law Judge's initial decision as our own, the following changes be, and they are hereby, made:

(1) On sheet 2, lines 19 through 23, substitute "Complainant contends that the agreement was for a charge of $25 to cover the trip from Montgomery to Shorters and that there would be no charge for the return trip. Defendant contends that the agreement was for a separate charge of $25 for each move in either direction." for "Complainant contends that the agreement was for a charge of $25 to cover a round trip from Montgomery to Shorters and back to Montgomery. Defendants contends that the agreement was for a charge of $25 to cover one-way moves only."

(2) On sheet 2, line 39, change "I.C.C. H-56" to "I.C.C. H-54."

(3) On sheet 3, line 3, change "$28.36" to "28.76."

(4) On sheet 5, line 36, substitute the word "complainant" for "defendant."

***It is further ordered,* That the complaint filed in this proceeding be, and it is hereby, dismissed.**

The statement of facts, conclusions, and findings of Administrative Law Judge Forest Gordon, follows:

The matter of this complainant is being handled under the Commission's modified procedure. The statement of fact and argument of complainant and defendant have been submitted in written form, without oral hearing.

By complaint filed July 15, 1974, Southern Car Service, Inc. (SCS), the complainant, alleges that certain tariff charges paid under protest by complainant and collected by the Western Railway of Alabama (W of A), the defendant, for the movement of certain railway cars from Montgomery, Ala., to the SCS private railway car cleaning facility at Shorters, Ala., and from complainant's facility at Shorters to Montgomery were not published in accordance with a prior agreement between the parties, were in excess of the legally applicable rates published in the tariff thereby violating section 6 of the Interstate Commerce Act, were unjust and unreasonable in violation of section 1 of the act, and were unduly prejudicial in violation of section 3 of the act.

On October 13, 1974, defendant moved that the complaint be dismissed because of legal insufficiency appearing on the face of the complaint. Concomitantly, it moved to strike various portions of complainant's opening statement of facts. On January 14, 1975, Division 2 denied defendant's motion to dismiss the complaint, but granted its motion to strike as hearsay that portion of complainant's statement of facts alleging that the defendant's parent line, Seaboard Coast Line, was providing free movement of empty tank cars to a car cleaning facility at Waycross, Ga.

Complainant moved on November 5, 1974, to amend its claim for damages as set forth in its complaint ($33,901.28) and its September 16, 1974, statement of facts ($63,624.71) to instead read $8,570. It also moved to strike various portions of defendant's verified statement pertaining to a cost study and traffic estimate performed in connection with the construction of the car cleaning facility at Shorters. In an order dated January 14, 1975, Division 2 granted complainant's motion to reduce its damages sought to $8,570, but denied the motion to strike.

The complainant, Southern Car Service, Inc., is an Alabama corporation providing cleaning and repair services for the owners and/or lessees of private railroad cars (cars of other than railroad ownership). In the fall of 1971 officers of complainant and defendant conferred on the possibility of installing a rail turn-out to serve complainant's future private car cleaning facility to be built at Shorters. The parties agreed that the turn-out should be constructed and a tariff would be published as to rates to be charged for transport over it. Complainant and defendant disagree as to the interpretation of their agreement and the subsequent published tariff. Complainant contends that the agreement was for a charge of $25 to cover a round trip from Montgomery to Shorters and back to Montgomery. Defendant contends that the agreement was for a charge of $25 to cover one-way moves only. This alleged parole agreement was subsequently confirmed by two letters between the parties; one dated November 30, 1971, and the other December 8, 1971. The November 30, 1971, letter from complainant stated that defendant "would publish the following one-way charges to Shorters:

from Montgomery	$25.00
Selma	45.00
Atlanta	80.00."

The letter also indicated that the above charges would apply only to empty tank cars moving to Shorters for cleaning and/or repairs that had not had prior loaded movement over W of A trackage. The December 8, 1971, letter from defendant acknowledged receipt of complainant's letter of November 30, 1971, describing it as "regarding the installation of turn out *** to your facility coincidental with the publication of one-way per car charges as outlined in your letter." Defendant also indicated in this letter that it would seek the necessary approval for publication of these charges.

On July 1, 1972, B. B. Maurer, Agent Mileage Tariff 7-C, I.C.C. H-56, item 49, became effective establishing a charge of $25 for moving empty tank cars from Montgomery to Shorters and $25 for the return from Shorters to Montgomery. The tariff excluded from this charge all empty tank cars which had their last revenue line haul over the line of defendant. During July 1972 defendant began delivering empty tank cars to complainant's facility. The initial bills sent by defendant to complainant were returned to defendant with a notation that "There has been a prior loading over W of A." Complainant contends that defendant responded that the W of A had no means of checking cars to determine over what line they last had made a loaded move. Defendant indicates that it does have such means, that in accordance with the tariff it does not charge SCS for such moves, and that in every case, except one, where SCS has contested such charges the charges were determined to be valid. In September complainant received its first bills for the return trip from Shorters to Montgomery in addition to bills for movements from Montgomery to Shorters. These return trip bills, as well as all subsequent return trip bills were paid by complainant with a letter of protest attached to each remittance.

In the complaint of July 15, 1974, damages in the amount of $33,901.28 were claimed out of a total amount of $53,120.24 paid to defendant for movement of all cars over the Montgomery-Shorters line between July 23, 1972 and April 9, 1974. In complainant's statement filed September 16, 1974, the period covered was extended from July 23, 1972 to September 13, 1974, thereby increasing the total amount paid to defendant to $63,624.71. On November 5, 1974, complainant moved to amend its complaint so as to reduce damages claimed to $8,570. This amendment was approved by Division 2 in its order of January 14, 1975.

Complainant alleges a violation of section 1 of the act in that it entered into an agreement with defendant establishing a charge of $25 for a round trip between Montgomery and Shorters prior to the publication of Item 49 of B. B. Maurer, Agent's

Mileage Tariff 7-C, I.C.C. H-54, which established a different rate of $25 in each direction. Complainant indicates that while negotiating with defendant, even though he resisted paying any charges for movements to his facility, he did accede to a $25 charge.

The primary issue thus drawn is whether the agreement between complainant and defendant encompasses a charge for each one-way trip between the points involved, or whether the single $25 charge covers the entire round trip from Montgomery to Shorters and return to Montgomery. Defendant argues that it never intended to provide service to complainant's facility for any charge that would not at least cover its variable costs. Defendant states that it performed a cost study in 1971 in order to determine its variable costs to move an empty tank car between Montgomery and Shorters, although no such study was put in evidence. The results of the study according to defendant shows one-way variable costs to be $14.38 and $28.36 for a round trip. Thus, the $25 charge for a round trip would be insufficient to cover defendant's variable costs. Although complainant objected to consideration of the cost figures, since the study itself was not presented, no cost evidence was introduced by complainant to counter defendant's alleged costs. In the absence of such evidence, defendant's costs are acceptable.

Complainant contends that the confusion surrounding the initial billing, whereby defendant did not charge for the return trip from Shorters to Montgomery until over a month after the initial bills were received and during which various defendant employees and persons associated with defendant expressed confusion as to the actual agreement, supports its contention that the agreement prior to the tariff was to cover a round trip, not just one way.

According to complainant, after the $25 charge had previously been agreed to, a meeting was held with defendant in February at which complainant expressed his concern over the $25 charge. Defendant was told such a charge would leave little revenue to cover complainant's other costs. Complainant alleges that in response, the president of the W of A verbally agreed to rescind the $25 charge when the existence of the tank car cleaning facility attracted increased tank car business for the defendant. Defendant indicates that it never has had a substantial volume of tank car traffic and would not have entered into such an agreement. Moreover, even after complainant started operations defendant states that no appreciable increase in tank car business was experienced.

It is complainant's position that if any rate is applicable to the transportation at issue, it is not item 49 of the applicable tariff, but item 125 which essentially establishes a rate of $.10 per mile with a minimum of 100 miles for each handling railroad. Defendant argues that item 49 is more specific than item 125 and is therefore controlling. Complainant charges further that it was misled by defendant because it is relatively unskilled in the procedure for publishing tariffs and that defendant took advantage of its naivete.

Complainant also alleges that defendant is in violation of section 3 of the act because it moved cars other than tank cars without charge over the route in question while still charging for tank cars. In response to this allegation, defendant states that it will investigate this practice and where charges were appropriate, bills will be submitted. It could well be that these cars for which no charge was submitted were coming off a line-haul movement by W of A.

Complainant contends that the Commission in *Mileage Allowances, Tank Cars*, 337 I.C.C. 23 (1970) recognized that a car cleaning facility which serves all railroads cannot be forced to bear the full burden of providing such a service. Defendant points out that this decision does not prohibit a railroad from charging for moving empty tank cars to cleaning facilities but only includes dicta dealing with such movements, and is in fact based on a substantially different factual situation than is found in the instant proceeding. Defendant cites ***Indiana Harbor Belt R. Co.* v. *General American Transportation Co.***, 368 F. Supp. 904 (1973) as standing for the proposition that it is appropriate to require a railroad to move privately-owned cars empty for cleaning without direct compensation only where the railroad involved enjoys the benefit of line-haul revenue from such cars.

Complainant supplied a list of car cleaning shops of which, according to complainant, most do not pay transportation charges to the delivering railroads; and all except one of those shops that do pay, or expect in the future to pay, charges are in litigation on the issue. This, complainant contends, results in discrimination in the instant case since it is being charged for such movements. Defendant replies that complainant has not met his burden of proof in establishing that these listed facilities operate in circumstances similar to those of complainant.

DISCUSSION AND CONCLUSIONS

With regard to the initial issue of what was agreed to by the parties as a charge for moving empty tank cars between Montgomery and Shorters prior to the publication of item 49 of the tariff, the Commission has determined that in regards to such agreements it will not undertake to enforce, interpret, or determine the legal effect thereof, nor be bound thereby when the lawfulness of such rates is challenged in appropriate proceedings. ***Stream Line, Inc.*, v. *Ill.-Minn. M. Carriers' Conference, Inc.***, 22 M.C.C. 373 (1940). As item 49 of the tariff was properly published and in unambiguous terms, it was valid and enforceable.

On the issue of whether item 49 or item 125 of the tariff applies in the instant case, as item 49 is the more specific of the two, it would take precedence over item 125, and thus be applicable here, ***Lufkin Rule Co.* v. *Atchison, T. & S.F. Ry. Co.***, 253 I.C.C. 224 (1942).

As to the reasonableness of the $25 one-way charge, defendant's one-way variable cost for transporting empty tank cars between Montgomery and Shorters was $14.38 in 1971. A round trip would result in a variable cost of $28.76. Presumably, these figures would be considerably higher in today's inflated dollars. A $25 round trip charge would not allow defendant to cover its variable cost, resulting in defendant subsidizing this service from profit from other operations. Also complainat has failed to establish that the operation of its car cleaning facility has attracted additional tank car traffic and revenue for defendant. Consequently, a $25 one-way charge in each direction is not unreasonable.

As to complainant's charge that it is being discriminated against by having to pay the defendant delivering railroad for transporting empty tank cars to his facility while many other car cleaning facilities do not incur such a charge, complainant has not established that the noncharging delivering railroads are not receiving some benefit, such as the generation of additional revenue by having additional tank cars traverse their trackage as a result of the attraction of the car cleaning facility, to compensate them for their expenditure of resources in delivering the cars to the car cleaning facility. And, as has already been stated, defendant has not established that his facility is inducing additional revenue for defendant, a charge for defendant's delivery service is not unreasonably discriminatory.

Contentions of the parties as to fact or law which are not specifically discussed hereinbefore have been given due consideration and are found to be either not materially significant or justified.

This decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

It is ordered, That the complaint herein be, and it is hereby, dismissed.

And it is further ordered, That unless stayed by the Commission on its own motion, or by the timely filing of exceptions pursuant to the Commission's General Rules of Practice, this order shall become effective as the order of the Commission 30 days from the date of service hereof.

EX PARTE NO. 137

CONTRACTS FOR PROTECTIVE SERVICES

Decided June 6, 1977

Upon referral by the United States District Court for the Northern District of California, proposed mechanical protective service contracts submitted to determine if in compliance with the Commission's reports and orders, 318 I.C.C. 111 (1962), and 340 I.C.C. 754 (1972), and the district court's injunctive judgment, 355 F. Supp. 700 (N.D. Calif. 1973), affirmed 524 F. 2d 1025 (9th Cir. 1975), *cert. denied* 424 U.S. 911 (1976). Various proposed contracts approved, disapproved, and modified. Parties ordered to enter into the contracts found in compliance with the above orders and judgment within 45 days.

Peter J. Hunter, Jr., Gordan Johnson, Fielding Lane, Harry Lustgarten, Jr., Michael A. Smith, and *Herbert A. Waterman* for various petitioners.

REPORT OF THE COMMISSION

BY THE COMMISSION:

This proceeding is now before the Commission upon referral of the "order enforcing this court's injunctive judgment entered March 7, 1973" filed by the United States District Court for the Northern District of California on June 9, 1976. It is the latest effort by the courts and the Commission to resolve a controversy that has continued since our August 27, 1962, order in this proceeding at 318 I.C.C. 111 (the 1962 order). That order required that all carriers receiving protective services[1] under any contract, arrangement, or agreement should submit for the Commission's approval on or before 120 days from the effective date of the order new or superseding contracts covering protective services performed under contracts then on file with the Commission as well as those performed under the Division Sheet 7 arrangement which the Commission found did not compensate the car lines for furnishing mechanical protective service. The Commission further ordered that the new contracts were to conform with other provisions of the order which stated that each protective service charge would yield to the person performing the charge no less than the cost of performing the service. The Commission added that the protective service charge might include a reasonable profit not in excess of 6 percent. If the protective services do not cover the costs then the car line company shall bill the railroads and express companies on a proportionate basis for the amount of the loss. This order was entered pursuant to section 1(14)(b) of the act which makes it unlawful for any common carrier to make any contract, agreement or arrangement for the furnishing of protective service unless and until such arrangement has been submitted to and approved by the Commission as just, reasonable, and in the public interest.[2]

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[1] Protective services are special services for the protection of perishable commodities from the elements while moving in transit. Mechanical protective services (MPS), a subcategory thereof, are defined as the protection furnished the lading by or through the operation of a mechanical unit in a car so equipped.

Pacific Fruit Express Company (PFE) filed suit against 90 defendant railroads before the California court to enforce the Commission's 1962 order. It requested injunctive relief under section 16(12) of the act and damages under sections 8 and 9 of the act for alleged noncompliance with the requirements of the 1962 order. The Commission's Bureau of Investigations and Enforcement participated in this court litigation as a plaintiff and also filed for injunctive relief against the same defendants. In response to the court referral of certain questions, the Commission in 1972 interpreted its 1962 order in *Contracts—Pacific Fruit Exp. Co. & Akron, C. & Y. R. Co.*, 340 I.C.C. 754 (the 1972 order). Thereupon, the court in *Pacific Fruit Exp. Co.* v. *Akron, Canton & Youngstown R. Co.* 355 F. Supp. 700 (N.D. Calif. 1973) affirmed 524 F. 2d 1025 (9th Cir. 1975), *cert. denied* 424 U.S. 911 (1976), found that the defendant railroads had failed and refused since 1962 to comply with the Commission's 1962 order since they did not enter into or submit to the Commission on or before 120 days after the effective date of the order new or superseding contracts. Thus, the court found that PFE was entitled to a judgment in its favor on the issue of liability of the defendants to it for damages incurred since January 1, 1964—basically the difference between the amount PFE had been paid under Division Sheet 7 and the amount it would have received if the defendants had complied with the 1962 order-together with interest, attorneys' fees, and costs of suit. The court is currently determining amount of these damages.

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[2] Section 1(14)(b) provides:

> It shall be unlawful for any common carrier by railroad or express company, subject to this part, to make or enter into any contract, agreement, or arrangement with any person for the furnishing to or on behalf of such carrier or express company of protective service against heat or cold to property transported or to be transported in interstate or foreign commerce, or for any such carrier or express company to continue after April 1, 1941, as a party to any such contract, agreement, or arrangement unless and until such contract, agreement, or arrangement has been submitted to and approved by the Commission as just, reasonable, and consistent with the public interest: *Provided*, That if the Commission is unable to make its determination with respect to any such contract, agreement, or arrangement prior to said date, it may extend it to not later than October 1, 1941.

The court also granted summary judgment to PFE and the Commission on the claim of injunctive relief. It enjoined the defendant railroads from continuing to fail, neglect, or refuse to comply with the 1962 order. It ordered the defendant railroads to enter into good faith negotiations with PFE within 60 days and enter, within that period, into new, superseding contracts with PFE to be effective January 1, 1973, and to conform with our 1962 order.

The court further ordered that if the new superseding contracts were not submitted to the Commission within the period fixed because of failure of the parties to agree on a contract, the parties shall, within 20 days from the expiration of the 60-day period, petition the Commission for its approval or disapproval of the provisions the parties agree upon and also for approval, disapproval, or modification of further provisions that the parties cannot agree upon and for further instructions or orders the Commission may deem necessary concerning the form or content of such proposed contracts. The Ninth Circuit Court of Appeals upheld the district court on the issue of the injunction.

Subsequently, PFE and the Bureau of Investigations and Enforcement filed motions with the district court to enforce the courts 1973 "order enforcing this Court's injunctive judgment entered March 7, 1973." The court found that PFE and the defendants had not been able to agree on new, superseding contracts and had not petitioned the Commission as provided in the court's injunctive judgment and thereupon ordered PFE and defendants to petition the Commission within 30 days for approval, disapproval, or modification, in whole or in part, of such form of contract as each party proposes. The Commission is to treat any petition filed pursuant to this order as having been referred to it by the court. Upon the filing of these petitions the Commission is to expeditiously approve, disapprove or modify, in whole or in part, the parties' contract proposals. The court further requested that the Commission give the parties further instructions or orders concerning the form or content of such contracts, including but not limited to a determination as to which of the proposed contracts or the modifications thereof, comply with the Commission's 1962 and 1972 orders and the court's 1973 injunctive judgment. Thereupon, the Commission shall issue an order directing the parties forthwith to enter into contracts found to be in compliance. The parties are to comply promptly with any instructions or orders of the Commission and in no event later than the 45 days after such instructions or orders.

As a result, seven proposed contracts were submitted by the parties, five by various defendant railroads and two by PFE. On June 29, 1976, PFE filed its petition for approval of its two proposed contracts (see appendixes A and B). On July 7, 1976, certain defendant railroads filed contracts (appendixes C and D), and on August 16, 1976, various railroads filed a supplement to this petition. On July 8, 1976, the Norfolk and Western Railway Company filed a petition for approval, and on July 29, 1976, the Rock Island filed its petition. By order of October 14, 1976, the Commission granted the defendant railroads leave to file their tendered reply of September 20, 1976, and the PFE leave to file a reply which was submitted on October 27, 1976. PFE had also filed a reply on July 27, 1976.

A number of the defendants listed in the June 9, 1976, order (appendix G), filed contracts with PFE long after the 30-day period for submission of contracts had expired (see appendix H): the Baltimore and Ohio Railroad Company, the Chesapeake and Ohio Railway Company, the Chicago South Shore and South Bend Railroad, and the Western Maryland Railway Company on January 12, 1977; the Illinois Central Gulf Railroad on January 13, 1977; the Chicago, Milwaukee, St. Paul and Pacific Railroad Company on February 7, 1977; the Norfolk and Western Railway Company on February 9, 1977; the Akron, Canton & Youngstown Railroad Company on February 9, 1977; the Delaware and Hudson Railway Company on February 24, 1977; the Maine Central Railroad Company on March 14, 1977; the Detroit, Toledo and Ironton Railroad Company on April 4, 1977; the Toledo, Peoria and Western Railroad Company on April 13, 1977; and the Long Island Railroad Company on May 9, 1977. We shall consider all the above late-filed contracts separately. We shall still, however, consider in this report the proposed contracts of certain defendants who subsequently reached agreement with PFE: the so-called Chessie System proposed contract submitted July 9, 1976; the Norfolk & Western proposed contract submitted on July 8, 1976; the Illinois Central proposed contract on July 9, 1976; and the Chicago, Milwaukee, St. Paul & Pacific proposed contract on August 16, 1976. Many of the findings pertaining to these contracts also apply to other contracts submitted under the court referral. Furthermore, the modified Chessie System and Illinois Central contracts we have approved in appendixes E and F are two of the approved contracts that must be entered into within 45 days of our order herein. And, should the Commission not approve any of the late-filed contracts between PFE and certain of the defendants, then our order herein provides that those defendants and PFE must enter into one of the approved contracts.

Some of the determinations made by the Commission pertaining to the proposed contracts are clear legal interpretations of our regulations and orders. Others amount to, in effect, arbitration of matters that the parties should have agreed to and did not, necessitating the court's referral of these matters to the Commission. In this latter situation, we do not claim that our determinations are the only ones possible but simply that they are the most reasonable and fair ones based on the record submitted by the parties. Our findings in such matters do not preclude car lines and carriers outside the ambit of our order herein from voluntarily agreeing to different terms. The Commission will look upon such contracts to determine whether they are just, reasonable, and in the public interest and thus worthy of approval under section 1(14)(b) of the act.

PFE'S PROPOSED CONTRACTS

PFE submitted in appendix A a copy of a contract between it and the Chicago and North Western Transportation Company (the CNW contract), which had been approved by the Commission on May 13, 1975, and in appendix B a copy of a contract between it and the Southern Railway (the Southern contract) which had been approved on July 21, 1975.

The railroads object to the CNW contract. They point out that when this contract was submitted to the Commission for approval on August 27, 1974, they attempted to intervene because they felt the contract was objectionable in a number of respects, including the treatment of MPS cost associated with nonperishable shipments and the apparent conflict with Commission approved contracts PS-12 and PS-8. On January 14, 1975, the Commission denied the petitions holding that the contracts were not models. Thus, Petitioners argue that the CNW contract should not be used as a model in this instance.

The petitioners also submit that they should not be required to enter into the CNW form of contract because additional important considerations were behind the PFE-CNW contract other than a desire to comply with the 1962 order or the mandate from the District Court for the Northern District of California. Petitioners allege that, in exchange for the PFE-CNW contract, CNW would be given routing privileges by one or both of PFE's parents, Union Pacific Railroad and Southern Pacific Transportation Company, as to perishable traffic from the West moving to Chicago.

We find the petitioners objections to the CNW contract to be without merit. It is true that the Commission ruled on January 14, 1975, that these contracts were not "models"; our consistent interpretation of the 1962 order has been that, within its relatively broad ambit, there is no single correct form of MPS contract. We have allowed the railroads leeway to negotiate a specific contract within the guidelines of the 1962 order. Thus, contracts No. PS 100 between the Southern Railway and Pacific Fruit Express, No. PS 111 between Seaboard Coast Line Railroad *et al.* and PFE, and No. PS 118 between the Penn Central and American Refrigerator Transit Company, all contained different provisions and all have been approved by the Commission. However, since the Commission, under the court referral order, is to "approve, disapprove or modify the contract proposals submitted by any of the parties" we must evaluate this contract.

The railroads assertions that CNW was given routing privileges by PFE's parent companies is denied by PFE and has not been supported by any evidence. Under these circumstances, we must determine whether the contract proposal on its face is just, reasonable, and consistent with the public interest under 1(14)(b) of the act.

The railroads object to the second alternative proposal of PFE, the Southern Contract, since it requires payments that include profit and 7.5-percent return on working capital. They argue that the profit element is only permissive and the 7.5 percent return is contrary to the 1962 order.

We find these objections to be without merit. The PFE contracts contain a provision that should the car line receive a profit from

MPS, it will share such profit with the railroads, until PFE and the railroads each receive 6 percent profit, with the railroads thereafter to receive the entire remainder. The railroads proposed contracts contain profit provision as do all the contracts that Commission has approved. The 7.5-percent cost of capital has been apparently confused with the maxinum profit of 6 percent allowed under the 1962 order and there is no prohibition to such a cost of capital.

The railroads also allege that certain Mexican railroads have entered into MPS contracts with PFE requiring that they attempt to route export perishable traffic to the United States via routes in this country favorable to PFE's parents, the Southern Pacific and the Union Pacific. Such alleged preferential routing is said to be in violation of 3(4) of the act. Further, PFE's losses associated with the allegedly preferential arrangement are covered in PFE's contracts and thus render the contracts unjust and unreasonable.

The issue of the Mexican railroad contracts has no place in this proceeding. It is before the California court on the trial of the amount of damages. PFE contends that the cost and revenues from mechanical protective service in Mexico under the contracts are reviewed at least once annually and adjusted as needed to insure that no losses occur.

The railroads further argue that PFE's proposed contracts are contrary to the public interest in light of the car-hire contract between PFE and its parents, the Southern Pacific and the Union Pacific. The railroads state that protective service revenues and expenses are considered when PFE calculates the compensation due the Southern Pacific and Union Pacific under the car-hire contract. Thus, they allege that there are no safeguards in the proposed PFE contracts that would protect petitioners from paying unreasonable amounts for refrigeration units in PFE's cars which are being used to generate payments to the parents under the car-hire contract. They also submit that while petitioners would be subsidizing the units in the cars, they would not be participating in the compensation being produced by the car and units.

In response, PFE argues that these allegations involve MPS and MPS units and not compensation for the use of refrigerator cars under 1(14)(a). It states that its car-hire contracts have been a matter of public record and on file with the Commission since 1941. Furthermore, PFE argues that under its proposed contracts, there is sufficient opportunity for the railroads to conduct audits of PFE to assure themselves that the MPS billings are proper and reasonable.

We feel that the railroads' arguments are without merit in this proceeding under the court referral. That order and the court's 1973 injunctive judgment and order which interpreted the 1962 order directed the parties to enter into contracts that would compensate PFE for its full cost of providing MPS. The Ninth Circuit Court of Appeals affirmed the court's 1973 decision. The railroads cannot relitigate here their requirement to compensate the carlines for their costs.

Thus, based on the above reasons, we approve without modification the CNW and Southern contracts, finding them to be consistent with our 1962 and 1972 orders and the court's injunctive judgment and order and its referral order.

THE CHESSIE SYSTEM PROPOSED CONTRACT

The defendant railroads submitted the Chessie System proposal (appendix C) which resembles the "revenue prorate" type of contract similar to the one between PFE and the Southern Railway. PFE, however, raises a number of objections to this contract.

1. *95-percent divisional allowance.*—PFE objects to the requirement that the railroad pay 95 percent, instead of the current 80 percent, of the MPS tariff revenue to the origin carrier for allowance to PFE, provided the carriers participating in the shipment agree. PFE argues that an arrangement whereby some carriers are allowed 80 percent and others 95 percent would be unworkable since the car line is required to allocate its total deficit on the basis of the proportion each railroad has derived from the total line-haul freight revenues for shipments in PFE cars by all railroads in that period. PFE states that it would support a revision of the current arrangements if all carriers agreed to the 95-percent allowance.

We find nothing improper in the 95 percent allowance. It is not inconsistent with the 1962 order. We do not believe that such a proposal is unworkable since the proposal provides for a 95-percent allowance only if each carrier involved in a particular move agreed to that allowance; otherwise, payment would be in accordance with the applicable division sheet.

2. *Canadian movements.*—Paragraphs 1(f), 1(h), and 2(a) refer to deficits and revenues from MPS by railroads in the United States. Unlike the contract between PFE and Southern, no mention is made of deficits or revenues from furnishing MPS for shipments which move, in whole or in part, in Canada. The defendant railroads argue

that they should not have to execute a contract that includes the MPS costs associated with the Canadian movements of PFE's cars because the Commission lacks jurisdiction over intra-Canadian moves and its jurisdiction over all U.S.-Canadian moves is questionable. The railroads also allege that PFE comingles its costs incurred in the United States with its costs incurred outside the country. Thus, they contend that they would be subsidizing extra-territorial service.

PFE's objection to the exclusion of Canadian movements from the computation of the total deficit is well taken. PFE has a final injunctive judgment against the Canadian railroads directing them to contract with PFE on the same basis as all other carriers. This is not the proper forum and, at this late date, the time to argue the jurisdictional issue of the Canadian railroads. Furthermore, American and Canadian railroads would only be paying their fair share of PFE's deficits. PFE's proposed contracts would include the Canadian costs in the total calculation of the deficit for each year and would then allocate to each participating railroad, including the Canadian lines, their portion of that total deficit.

3. *Profit.*—PFE objects to the definition of "profit" in paragraph 1(g)(2), arguing that it does not comply with the definition of that term contained in our 1962 order since it is limited to owned property and equipment. They also argue that the 1962 order contains an allowance for working capital while the Chessie proposal does not.

The railroads, in support of their proposal, contend that PFE's argument that the profit element should be applied to leased as well as owned equipment is without merit since the 1962 order made "profit" strictly permissive. They also charge that the vast amount of equipment that PFE leases is through equipment leases with its two parents. This could result, they allege, in a profit for its parents.

We agree with PFE's arguments concerning the profit element. In our 1962 order, we stated:

> The charge for a protective service may include, in addition to cost, a reasonable profit not in excess of 6 percent of the book *cost of the property and equipment employed in furnishing the service*, less accrued depreciation, plus an allowance for working capital. [318 I.C.C. at 138. Emphasis added.]

Thus, although the profit element is permissive, once it is provided for, it must apply on all "property and equipment employed in furnishing the service" including leased and not simply owned equipment.

The railroads may, however, exclude working capital from their proposal. As seen in the language of the 1962 order above, working capital is also permissive and it is not a part of the definition of profit as was "property and equipment employed in furnishing the service." Thus, working capital does not have to be included simply because there is a profit element in the proposal.

4. *Revenues.*—PFE objects to the manner in which the Chessie's proposal defines revenues. It contends that the definition is unclear. The proposal states that the revenues are those "includible in revenue accounts 116 through 119 of the Uniform System of Accounts for Refrigerator Car Lines" which is found in 49 CFR 1205.

We believe that, contrary to PFE's contention, the proposed definition of revenues is clear since it is specific. We do agree, however, with PFE's argument that account no. 117 is not applicable since it deals with revenues received by PFE from its parent companies for supervision of shipments on the lines of its parents, a service performed exclusively for its parents. But we see no reason to exclude revenues from MPS units (116), fuel furnished MPS units (118), and MPS operations not otherwise provided for (119). It should be noted that PFE included revenues from these three account numbers in the evidence it submitted to the Commission that led to the 1962 order.

5. *General expenses.*—PFE objects to the proposal's definition of costs as those which are includable in expense accounts 301 through 321. They argue that this would exclude costs not mentioned in the accounts, including equipment rentals, property taxes, payroll taxes, and any proportion of general expenses of PFE.

The railroads argue that use of general expense is optional and excludable as a matter of negotiation. They allege that PFE excluded general expenses in its presentation to the Commission that led to the 1962 order. They also argue, citing *Bud Antle, Inc.* v. *Boston and Maine Corp.*, 343 I.C.C. 351 (1973) that where a noncarrier party voluntarily supplies refrigerator equipment and units to eastern terminating lines as a result of interchange from western railroads, the noncarrier is not entitled to payment from the eastern lines.

Except for the question of general expenses, we find PFE's criticisms of the exclusions of certain costs in expense accounts 301 through 321 to be without merit. The Chessie contract provides for equipment rentals (in paragraph 2(b)(2) of the proposal), property taxes (in paragraph 2(b)(5)), and payroll taxes (in paragraph 2(b)(6)).

We do agree with PFE, however, that general expenses should be included in any MPS contract. PFE did in fact include general expense in its presentation to the Commission that led to the 1962 order.

The reference to the *Bud Antle* case is not on point since it involved shipper-owned trailers and not car lines; moreover, there are Commission decisions and a court injunction directing the railroads to enter into contracts that would compensate the car lines. Finally, in Ex Parte No. 300, *Increases in Chgs. for Mech. Protective Serv., 1973,* 351 I.C.C. 237 (1975), the railroads presented evidence of the general expenses of the car lines (including PFE) to justify a rate increase for shippers; such general expenses should also be used to determine how the railroads will compensate the car line companies.

6. *Depreciation.*—PFE objects to the depreciation cost found in paragraph 2(b)(1) of the proposed contract being based on a 25-year life. It states that all contracts previously approved by the Commission provided for a 15-year life of the MPS units which is consistent with PFE's actual experience. To allow a 25-year life for depreciation, PFE argues, would reduce the annual costs recoverable by PFE below its actual costs.

We have, as PFE noted, previously approved MPS contracts with a 15-year life for depreciation purposes. We have found this cost, voluntarily agreed upon by the parties to those contracts, to be consistent with the 1962 order. However, we find the 25-year life to also be acceptable. We have no reason to believe that the 15-year life is any more accurate an indication of service life than the 25-year life.

7. *The 7.5 percent cost of capital.*—PFE objects to the proposed contract's 2.54-percent cost of capital before income taxes. They point out that all previous contracts approved by the Commission between PFE and the various railroads contained a 7.5-percent cost of capital. And, they argue, that in docket No. 33145, *Railroad Freight Car Per Diem Charges* decided December 24, 1975, we established a composite interest factor of 7.8 percent.

The railroads argue that the 2.54-percent rate is proper because, under the 1962 order, any rate of return is permissive. They also submit that in car-hire contract between PFE and its parents, a 2.54-percent rate is utilized.

We agree with PFE that a 7.5-percent cost of capital is reasonable. Although they are not "models," we take note that all contracts approved by the Commission since August 27, 1974, have contained a 7.5-percent cost of capital figure. Some of these contracts involved American Refrigerator Transit Company, another car line company. The railroads argument that the cost of capital is permissive is without merit. They are apparently confusing cost of capital with working capital. In any case, we find the 2.54-percent figure to be too low. As noted, we established in docket No. 33145 a 7.8-percent composite interest factor for the railroads. The cost of capital is a true cost and we find the 7.5-percent figure for this cost to be acceptable.

8. *Shipments not requiring mechanical refrigeration.*—PFE objects to paragraph 2(c) of the proposed contract which states that if loaded shipments of freight with MPS units not operating (UNO) exceeds 5 percent total loaded shipments, the MPS ownership costs for the year shall be apportioned over total MPS and UNO loaded shipments. PFE points out that the movement of perishables is highly seasonal and the demand for MPS cars fluctuates widely during different months of the year. PFE argues that it has to acquire MPS cars in sufficient quantity to cover the demands of the railroads who are trying to satisfy their shippers during peak demand periods, but during nonpeak months it may face a car surplus. In this latter situation, PFE, instead of letting its cars remain idle, uses them in the eastbound transportation of nonperishable (or "dry") freight, a task normally assigned for standard boxcars. PFE states that it is willing to accept an apportionment of MPS ownership costs similar to the one contained in the agreement between PFE and Seaboard Coast Line Railroad Company, approved by the Commission on April 19, 1976. Under that provision, if dry freight shipments exceed 25 percent of total loaded shipments, the MPS ownership costs shall be apportioned over total MPS and dry freight shipments, excluding loaded return movements of cars. Thus, PFE contends that the use of a 5-percent figure instead of 25 percent is unreasonably low and would tend to discourage use of MPS cars for dry freight loads even though there might be a temporary surplus of MPS cars. PFE argues that such dry freight loadings would serve to reduce the average per shipment cost of the car to the railroads and provide more efficient operations.

The railroads contend that a low UNO figure is a partial safety valve that would keep unjustified car use and purchases within bounds. They submit it is unjust and unreasonable for the railroads to subsidize a 25-percent UNO figure when, they allege, the majority of UNO's are for the benefit of the parent lines which use refrigerator cars to supplement their boxcar fleets.

We believe that under section 1(14)(b) of the act the 25 percent, not the 5 percent, UNO usage figure is "just, reasonable and consistent with the public interest." As PFE noted, we have already approved contracts with 25 percent UNO usage. And, we believe that the 5-percent limit would discourage car line companies from utilizing MPS equipment temporarily in surplus for the transportation of shipments not requiring mechanical refrigeration; there would be little or no encouragement for using surplus MPS cars to help alleviate car shortages. However, the 25 percent limit is not the only acceptable limit; we believe a compromise figure of 10 percent warrants approval and is incorporated in the modified contract found in appendix E.

9. *Warranty.*—PFE objects to paragraph 5 of the proposed contract which would have PFE warrant that the MPS units are fit for use and are in serviceable condition. It submits that PFE gave no warranty in Commission-approved contracts between PFE and various railroads and that liability for freight loss and damage claims have always been a railroad responsibility.

The railroads declare that it is not unusual for PFE to warrant its equipment since it has done so in its car-hire contract with its parents. They also contend that by entering into a new contract with PFE they will incur substantially increased expenses. They deny that they are already being compensated for losses which may result from a PFE defective unit.

We believe that PFE should not be required to warrant the fitness of its units. (However, PFE is not excused from exercising proper supervision to make certain its units are in fact in operating condition.) As PFE noted, the cost of freight and damage claims has been a railroad responsibility and is included in the Rail Form A variable cost calculations as an element in the linehaul rate base, not the MPS rate base. Further, under the current method of sharing the cost of freight and damage claims, only the carriers that participate in a particular shipment that has been damaged are responsible for a proportionate share. This result would be more equitable than under a warranty provision in MPS contracts where the cost that PFE incurred in paying freight loss and damage claims would be part of the cost calculations of the contract which would be shared by all railroad parties to the contract. Finally, although

PFE's car-hire contract with its parents contains an indemnity provision, its protective service contracts with its parents do not.

10. *Retroactive refunds.*—PFE objects to paragraphs 11 and 13 of the proposed contracts. Paragraph 11 provides that the railroads would be able to terminate the contract on 30-day notice if the Commission or any court should set aside, change, or modify the Commission's 1962 order. Paragraph 13 states that PFE would have to refund to railroad all monies paid thereunder if the Commission decides that no amount is due from January 1, 1973, to the present or any part of that period.

The railroads argue that paragraph 13 is just and reasonable. They submit that if the Commission or a court should hold that no amount or only a particular amount is due for a particular period, it would be inappropriate and unlawfully inconsistent to require full payment.

We find paragraphs 11 and 13 to be improper. This proceeding is pursuant to an order enforcing a final injunctive order that directed the parties to enter into contracts consistent with the Commission's 1962 and 1972 orders, effective January 1, 1973. It would be "inappropriate and unlawfully inconsistent" to undermine that injunction in the contracts that the parties were directed to enter into by order enforcing that injunction.

All in all, we cannot approve the Chessie System proposed contract. We find the contract deficient in regard to Canadian movements, profit, revenue account 117, general expenses, cost of capital, UNO's, warranty, and retroactive refunds. A version of this contract, modified to conform with the Commission and court orders in this proceeding is found in appendix E. We find this modified contract to be acceptable.

The Illinois Central Proposed Contract

The Illinois Central proposal is similar to the Chessie contract but according to PFE it is more closely related to its proposal than is the Chessie System's proposal.

PFE repeats for the Illinois Central proposal the objection it made to the Chessie's definition of profit. Our comments therein are also applicable here. This proposal, however, does contain an allowance for working capital of which PFE generally approves. Yet, PFE argues that the working capital definition is deficient since it omits an allowance for cash on hand. We believe, however, that nothing in the 1962 order would invalidate the Illinois Central's definition of working capital.

PFE notes that like the Chessie proposal, this proposal eliminates revenues and expenses incurred in Canada. Our comments above are also applicable herein.

The Illinois Central's proposal allows for depreciation of owned units on the basis of a 20-year life rather than the 15-year life supported by PFE. We believe, as noted above, that the 25-year life was an acceptable car life and we find the 20-year life to also be acceptable.

This proposal does not contain a provision for cost of capital and, as noted above, we believe a 7.5-percent cost is reasonable.

Paragraph 2(b)(6) of the Illinois Central's proposal specifically excludes general expenses. Our comments regarding the Chessie's omission of this element are applicable herein as they are pertaining to the right of terminationon 30 days' notice if the Ex Parte No. 137 regulations are changed, modified, or set aside.

Thus, we disapprove this contract. We have, however, modified it (appendix F) and find that modified contract acceptable.

THE N&W PROPOSED CONTRACT

The Norfolk and Western Railway Company (N&W) proposed a contract that would adopt all the terms of the Chessie proposal except that paragraph 1(h) would be revised to state that the N&W would pay PFE any MPS deficit incurred by PFE on shipments originating on the N&W. Thus, a railroad's share would be based on car line's MPS revenues on originations on that railroad compared to total car line revenue on all MPS shipments. The N&W argues that since all shipments in PFE cars must have an origin line, all PFE deficits would be covered by the proposal if it were applied to all railroads. The N&W also contends that the Commission has approved origin-line contracts under section 1(14)(b) as being in compliance with the Ex Parte No. 137 regulations, citing our decision in this proceeding at 321 I.C.C. 758 (1963). The N&W alleges that the Commission therein approved eight origin-line contracts, dated in May and June 1963, between eight railroads and the American Refrigerator Transit Co. (ART). In approving these origin-line contracts, the N&W submits that they were in accordance with the regulations 321 I.C.C. at 759.

PFE opposes the N&W proposal. It states that under this proposal, N&W would not be obligated to pay any proportion of the costs of

PFE on shipments which move via the lines of N&W but which do not originate on this line. This proposal, PFE argues, is designed to give N&W a windfall since it originates little or no perishable traffic and thus would not be obligated to share the costs for MPS shipments otherwise moving on 'its lines. For these reasons, it submits that the N&W proposal is not just, reasonable, and consistent with the public interest.

We cannot approve the N&W proposal. The language of the 1962 order is quite clear:

> In the event the person rendering the protective services shall not recover costs for any item or service rendered, such person shall bill the railroads and express companies receiving those services, *on a proportionate basis*, for the amount of the loss. [318 I.C.C. at 138. Emphasis added.]

Thus, each participating carrier in a movement of a loaded mechanical refrigerator car during which MPS is rendered is obligated to contract with the car line company to share, on a proportionate basis, in the amount of any loss of the car line. This view has been supported in our 1962 and 1972 orders, the district court's injunctive judgment and order, and in our decision at 321 I.C.C. 758, 759, which the N&W has erroneously cited as indicating that origin-line contracts were in accordance with our regulations. Further, the Commission-approved ART contracts that the N&W referred to contain the following provision:

> [I]n the event Refrigerator Company shall not have recovered its costs and profit, as described in Paragraph 6 of this Article, for any item or service rendered, Refrigerator Company shall bill Carrier and *Carrier shall pay its proportionate share of said loss.* [Emphasis added. Contract PS-47 between ART and Missouri-Pacific Railroad Company, pp. 8-9.]

Since the N&W adopted all the terms of the Chessie proposal, except for the origin-line provision, our findings concerning the Chessie contract also apply to the rest of the N&W contract. We disapprove this contract.

THE DIVISIONAL PROPOSAL

Certain defendant railroads resubmitted a so-called divisioned proposal which had originally been filed by letter dated April 19, 1976. The N&W, in its petition, also supports this proposal arguing that its approval would make the other contract proposals, including its own origin-line proposal, academic. Under this proposal, the railroads would pay PFE 95 percent of the MPS revenue instead of the 80 percent they now pay pursuant to Division Sheet 8. The remaining 5 percent would be divided among the railroads participating in the shipment. As a condition of this proposal, the railroads and PFE would join in requesting that the Commission revise its regulations so as to eliminate all yearend adjustments.

The railroads argue that this proposal is just, reasonable, and consistent with the public interest under section 1(14)(b) of the act. They term this proposal an "arrangement" and not a contract. They allege that the 1962 order provides only for "new or superseding contracts" and omits any guidelines or requirements for an "arrangement." Thus, the railroads argue that if a statutorily permissible arrangement were presented to the Commission, it would have to decide what guidelines applied. The railroads state that the Commission would review its contract guidelines and their rationale to determine its arrangement guidelines. The contract guidelines found in the 1962 order provide that cost "be based upon the best information available." The best information available as to MPS costs, according to the railroads, is found in Ex Parte No. 300 where costs were determined to be 95 percent of revenues. The railroads criticize PFE's contention that it has escalating costs of rendering MPS because of inflation and other factors, arguing that this assertion has not been proven.

We find that the divisional proposal does not comply with our 1962 and 1972 orders and the district court's injunctive judgment and order. Thus, we cannot approve this proposal. The distinction the railroads attempt to draw between "contract" and "arrangement" is meaningless in this court referral.[3] Our 1962 order directed carriers and car lines receiving protective services under any contracts, agreements, or arrangements to submit new or superseding contracts. And that order found that divisional proposals such as that proposed by the railroads were unacceptable under section 1(14)(b) because they bear no relationship to costs. PFE states that it has sustained substantial losses every year since 1964; a trial is currently being held on the damages for its MPS losses for the years 1964-72. The divisional proposal is fatally deficient since it does not comply with the 1962 order:

> The charge for each protective service shall yield to the person performing such service no less than the cost of performing the service ***. In the event the person

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[3] The railroads themselves have difficulty in distinguishing the two for the sake of their argument since they state: "Presumably, the Commission would tend to look to its contract guidelines for its arrangement guidelines."

rendering the protective service shall not recover costs for any item or service rendered, such person shall bill the railroads and express companies receiving those service, on a proportionate basis, for the amount of the loss.

OTHER PROPOSED CONTRACTS

The Chicago, Milwaukee, St. Paul & Pacific Railroad Company, in a supplement to the petition of certain defendant railroads, adopted the Illinois Central form of contract subject to the following modifications:

(a) To substitute for paragraph 5 of that form (appendix D) paragraph 5 of the Chessie form of contract (appendix C) on the subject of the fitness for use and the serviceable condition of the mechanical units.

(b) To include paragraph 9 of the Chessie form of contract on the subject of settlement of disputes.

(c) To include in paragraph 13 all of paragraph 13, other than its first sentence, of the Chessie form of contract on the subject of repayments in the event of specified contingencies.

Revisions (a) and (c) suffer from the defects discussed in our discussion of warranty and retroactive refunds in the Chessie contract. We find no objection to the inclusion of the Chessie paragraph on the settlement of disputes. All in all, we cannot approve this modification of Illinois Central proposal, since that contract itself was unacceptable and the modification has added two elements which have been rejected.

William M. Gibbons, trustee of the property of the Chicago, Rock Island and Pacific Railroad Company debtor (Rock Island), submitted a petition with a late-filed proposed contract. We will allow the proposed contract into the record. The petition also contains, among other matters, a petition for reconsideration of our Interim Report in this proceeding of June 29, 1976, reopening the record, and investigation of the level of MPS charges approved in Ex Parte No. 300 in relation to current costs. These other matters raised are outside the ambit of the court referral and will be considered in another order.

We find that we cannot approve the Rock Island proposal since it does not comply with our 1962 and 1972 orders and the injunctive judgment and order of the district court. For the reasons set forth in our discussion of the Chessie proposal, the contract is deficient because it excludes such costs as general expenses, payroll taxes, and property taxes; it limits cost of capital to 2.54 percent; and it contains a warranty provision.

The proposal has other defects. It makes the Southern Pacific and Union Pacific, parents of PFE, parties to the contract. The Southern Pacific and Union Pacific do not provide protective service to the Rock Island, and they have no place in a contract providing protective service by PFE to the Rock Island. Furthermore, paragraph 10, which directs PFE to "formulate equalization factors in connection with calculation of proportionate shares of profits and losses," is unclear. Finally, under paragraph 11, PFE is required to absorb any pretripping expenses on perishable shipments originating on the lines of its parent railroads. Under our 1962 order and 1972 order, however, pretripping expenses are required to be shared by all carriers who participate in the shipment requiring MPS.

PROCEDURAL ISSUES

The defendant railroads requested an oral hearing under section 554 of the Administrative Procedure Act. Section 554 provides for a determination on the record after opportunity for an agency hearing only if required by statute. Further, this section is inapplicable in "cases in which an agency is acting as an agent of the court," which is the situation under the court referral. The request is denied.

The N&W, in its petition for approval of its proposed contract, requested that the petitions from the court referral be consolidated with the Petition for Rulemaking and Modification and Clarification of Rules filed by certain Eastern Railroads on June 14, 1976.[4] The Bureau of Investigations and Enforcement filed on August 6, 1976, a memorandum in opposition to this consolidation. The request is denied. Under the court referral, we are to determine which contracts comply with our 1962 and 1972 orders and the court's injunctive judgment and order. We are not to modify the very order and regulations that the court upheld.

ULTIMATE FINDINGS

In summary, under the terms of the district court's referral we approve the CNW and Southern contracts (appendixes A and B respectively). We disapprove the Chessie System (appendix C), the Illinois Central (appendix D), the N&W, the Chicago, Milwaukee, St. Paul & Pacific, and Rock Island proposed contracts. We also disapprove the divisional proposal. We have modified the Chessie System and Illinois Central proposals to comply with our 1962 order and 1972 order and the court's injunctive judgment and order. (Appendixes E and F.) We approve these modified contracts.

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[4] By order dated December 28, 1976, the Commission denied the petition at that time pending the resolution of negotiations between carriers and carriers that had been suggested by the United States District Court for the District of Columbia in *Southern Ry. v. United States*, 412 F. Supp. 1122 (1976).

An appropriate order will be entered.

COMMISSIONERS HARDIN, GRESHAM AND MACFARLAND did not participate.

APPENDIX A

Contract for the furnishing of Mechanical Protective Service

THIS AGREEMENT, made and entered into this 20th day of August, 1974, by and between PACIFIC FRUIT EXPRESS COMPANY, a corporation of the State of Utah, hereinafter referred to as "Carline", and CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY, a Delaware corporation, hereinafter referred to as "Railroad"

WITNESSETH, THAT

WHEREAS, Railroad is a common carrier subject to the Interstate Commerce Act and as such is engaged in transportation of property over its lines, and

WHEREAS, Railroad holds itself out to provide protection against heat or cold by furnishing protective service in connection with certain of its transportation services, and

WHEREAS, Railroad from time to time may furnish such protective service to shippers by means of Carline's mechanical protective service units ("MPS units") in mechanical refrigerator cars owned or controlled by Carline, and

WHEREAS, Carline from time to time furnishes mechanical protective service ("MPS") to Railroad by means of preparing, servicing and furnishing units to Railroad, and

WHEREAS, Railroad and Carline mutually desire to enter an agreement for services provided by Carline, that will compensate Carline for its reasonable costs incurred in furnishing MPS to Railroad while the units are used or required on the lines of said Railroad

NOW, THEREFORE, in consideration of the mutual covenants hereinafter set forth, the parties hereto agree as follows

1. (a) Whenever an MPS unit in a mechanical refrigerator car owned or controlled by Carline bearing reporting marks "PFE", "SPFE" or "UPFE" is required or used by Railroad to provide protective service against heat or cold to a perishable shipment on Railroad's lines, Railroad agrees to pay Carline its share of Carline's deficit incurred in providing MPS as set forth below

(b) Railroad's payments shall be determined on a unit day basis with the Railroad's proportion of Carline's deficit for such MPS being the number of unit days Carline's units are used or required on the Railroad's lines in MPS in relation to the total number of such MPS unit days that Carline's units are used or required on all railroads.

(c) "Deficit" as used in this agreement shall mean the excess of MPS costs incurred over MPS revenues (excluding, however, any monthly payments by Railroad pursuant to this agreement and payments by other railroads on account of an MPS loss or anticipated loss). "Earnings" as used in this agreement shall mean the excess of MPS revenues, as defined above, over MPS costs. Revenue and expenses associated with inspection service performed by Carline pursuant to other agreements shall also be excluded in determining Deficit or Earnings. MPS costs used to determine Deficit or Earnings shall include the following Carline costs of ownership of units employed in furnishing MPS and the costs of preparing, servicing and supplying units employed in furnishing MPS.

(1) Depreciation of owned units, which shall be on the basis of 6 percent per annum over a 15 year period with a ten percent salvage value, or other Interstate Commerce Commission approved rates of depreciation and salvage for MPS units.

(2) Rentals actually paid or incurred for leased units, except that if any such lease after January 1, 1974, is from an affiliate of Carline, then such rental shall be computed on the basis used in the establishment of such rentals for equipment leased during the period 1963-1971, which permits recovery of the cost of the unit (as reduced by the equivalent before income taxes of any applicable investment tax credit) over 20 years with interest at the average rate of equipment trusts placed on the standard Philadelphia Plan in the year of inception of such lease by such lessor affiliates, plus one tenth of one percent additional interest per year. If no such Philadelphia Plan trusts are placed by such lessor affiliates in the year of inception of such lease, then the interest rate used will be the average rate incurred by lessor affiliates financing with a form and term most nearly similar to a Philadelphia Plan equipment trust.

(3) 7.5 percent before income taxes, of Carline's depreciated original cost of owned units, equipment, buildings and land, and working capital (including cash and material and supplies), which are devoted to MPS (which sum represents a composite rate of interest on borrowed funds and imputed interest on equity).

(4) Depreciation of repair facilities.

(5) Property taxes on units and repair facilities.

(6) Maintenance expense of units and repair facilities.

(7) Fuel costs.

(8) Lubricating oil and other supplies.

(9) Other expenses, including supervision, rent, injuries, insurance, stationery, printing, retirements, payroll taxes and such other and General Expenses as may be prescribed in the I.C.C.'s Uniform System of Accounts for Refrigerator Carlines from time to time, provided that such general expenses shall be allocated to MPS in the proportion that MPS operating expenses, less depreciation and retirements, bears to total operating expenses less depreciation and retirements, and provided further, that identifiable expenses, not related to MPS, as for example severance payments to employees not engaged in matters relating to MPS, shall be excluded from the above allocation.

(d) Extraordinary costs shall be considered an expense for the year in which incurred, unless otherwise directed by the Interstate Commerce Commission.

(e) In the event loaded car days of nonperishable or dry freight shipments shall account for more than 25 percent of Carline's total loaded car days for both current and immediately preceding years, the MPS ownership cost for the current year shall be apportioned over total MPS and dry freight loaded car days.

(f) Carline's MPS costs shall be determined from the books, records and accounts of Carline which shall be kept in accordance with the Interstate Commerce Commission's Uniform System of Accounts for Refrigerator Carlines, except as specifically provided herein. Carline shall retain all records from which such costs have been obtained for five (5) years following the calendar year of each shipment, and said records during said period shall be available for inspection and copying by Railroad at its expense.

2. (a) As soon as practicable after the close of each calendar year, but no later than 45 days after the end of the said calendar year, Carline shall determine from the best information available, including the results of the past year and taking into account any known or reasonably anticipated changes in MPS revenues and MPS costs, the following for the prospective year:

(1) Carline's estimated Deficit of providing MPS to all carriers participating in MPS shipments.

(2) The estimated annual total number of unit days that Carline's units will be used or required on the lines of all railroads, and

(3) The estimated projected unit day Deficit.

(b) Carline shall provide the detail set forth in paragraphs 2(a)(1), (2) and (3) in writing to Railroad, including the basis of all estimates or projections. For the purposes of this agreement, Railroad or its agent may audit Carline's records so as to verify the accuracy of Carline's costs, revenues, unit days and/or estimates thereof. For the purpose of the annual projection for the prospective year of the estimated unit day deficit, said review or audit shall be made within 30 days after receipt of Carline's statement. In all respects Carline shall cooperate with such audit and make available its books, accounts and records as may reasonably be requested at such times as are agreed to at Carline's principal office.

(c) Periodically during each current year (but not more frequently than quarterly), Carline shall review the estimates provided for in paragraphs 2(a)(1), (2) and (3) to determine whether a substantial difference then exists in any of those estimates. If such substantial difference then exists in the unit day deficit (which shall be an amount greater than 20 percent), Railroad shall be advised in accordance with paragraph 2(b) and the projected unit day deficit shall be appropriately adjusted.

(d) Carline shall bill the Railroad on a monthly basis for its share of the annual Deficit and said bill shall be prepared by multiplying the estimated projected unit day deficit, referred to in paragraph 2(a)(3), by the number of days the unit was used or required for that month on the lines of Railroad as determined in accordance with paragraph 3. Railroad shall pay said bill within 30 days after receipt thereof.

(e) Not later than 45 days after the end of each calendar year, Carline shall determine and advise Railroad of the preliminary Deficit or Earnings for said calendar year. As soon as practicable after the end of each calendar year, Carline shall determine and advise Railroad of its final Deficit or Earnings.

(1) Upon computation of the preliminary and final actual results, if Carline incurs a Deficit, it shall compute Railroad's share of the Deficit in the ratio that Railroad's unit days in MPS service bear to total unit days in MPS service on all railroads (referred to hereinafter as Railroad's "Proportionate Share"). Railroad's total monthly payments of the estimated deficits shall be applied to Railroad's Proportionate Share

of the Deficit. If Railroad's Proportionate Share of the Deficit exceeds or is less than its aggregate monthly payments, Carline shall bill Railroad for the difference, or pay Railroad accordingly.

Payments due to or payable by Carline as a result of computations in this sub-paragraph (1) and the following sub-paragraph (2) shall be payable within 30 days of receipt of written determination thereof, subject to the right of the Railroad to audit promptly Carline's books and records.

(2) If Carline has Earnings, such Earnings shall be distributed in the following manner: Until Carline has received a Profit, as hereinafter defined, one-half of its Earnings shall be retained by Carline and Carline shall pay to Railroad its Proportionate Share of the other one-half of said Earnings, in addition to returning to Railroad its monthly payments made pursuant to this agreement. After Carline has received its Profit, Carline shall pay to Railroad its Proportionate Share of all additional Earnings.

"Profit", as used herein, shall be defined as an annual before-tax profit and shall be composed of the following:

(a) Six percent of the average book cost of the property and equipment employed in furnishing MPS, less the related accrued depreciation.

(b) In the case of property and equipment leased by Carline, book cost and depreciation applicable thereto shall be computed and reconstructed on the same basis as applies to Carline's owned property and equipment of similar kinds.

(c) An allowance for working capital of six percent of the average cash and cost of material and supplies devoted to MPS.

3. (a) When Railroad transports a shipment on its lines requiring or using a unit (including shipments moving from an in-transit point on its lines), the unit day count chargeable to Railroad shall commence and terminate as follows:

(1) The unit day count shall commence on:

(a) the beginning of the day the car is placed or constructively placed for loading, if the shipment originates on Railroad, or

(b) the day the car is received in interchange from another railroad.

(2) The unit day count shall terminate on:

(a) the end of the day the car is released by the consignee, if the shipment terminates on Railroad, or

(b) the day preceding the day the car is interchanged to another railroad.

It is the intent of the parties to follow the AAR Code of Car Hire Rules, as they may be revised from time to time, in determining responsibility for chargeable unit days hereunder. For the purpose of this agreement, Carline shall compute the unit day count for all railroads in this manner.

(b) When shipments are stopped in-transit on Railroad for completion of loading, partial unloading, inspection, or for any other reason under the control of the shipper or the consignee as permitted by tariff, the unit day count for MPS shall not be discontinued.

(c) Times of official placement and release, as specified above, shall be those defined by perishable protective tariffs or freight tariffs, as applicable.

(d) In the case of shipments moving under Rules 711 or 712 of the Perishable Protective Tariff, MPS unit days shall apply for the full period of shipment as described above.

(e) Railroad is a participant in Telerail Automated Information Network ("TRAIN"), and all Railroad's junction reports are issued to car owners including Carline. Said junction reports indicate time and place of interchange between railroads and shall be used to determine unit days on Railroad for purposes of this agreement.

4. (a) If junction reports are not available from TRAIN, Railroad agrees to provide Carline with records of interchanges of Carline's cars handled by Railroad. Railroad also agrees to furnish Carline with National Perishable Freight Committee Forms II, III and V as required by NPFC Circular 20-F, or similar forms agreed by the parties, with respect to the dates Carline's cars are placed for loading, stopped in-transit or released after having been unloaded. In lieu of such NPFC forms, copies of freight waybills, freight bills, or other documents showing official dates cars are placed or released, respectively, may be furnished to Carline.

(b) In the event that Carline does not receive one or more of the above documents from Railroad with 70 days following the close of the waybill month, Carline shall issue tracers for interchange and NPFC data to such officials as Railroad may designate.

(c) Within 60 days after the issuance of tracers as provided above, Carline shall determine the number of MPS unit days chargeable to Railroad, and issue an advice thereof.

(d) In the event that Railroad fails to provide the documents to Carline as required herein within 60 days after issuance of tracers as provided above, the MPS charges payable by Railroad on any given shipment shall be computed to the date of the next available document, e.g., if interchange records are not available from TRAIN for an MPS shipment, and Railroad fails to furnish supplemental data as specified in paragraph 4(c), charges to Railroad shall continue until next record of interchange of car, or until released from unloading, whichever occurs first. If National Perishable Freight Committee Form III, or document showing official time of release of car submitted by destination railroads, has not been received by Carline as specified in paragraph 4(c), charges for that railroad will continue until the next available interchange record, or record of car having been placed for loading with respect to another shipment, whichever occurs first. If NPFC Form II or V or other document showing similar information with respect to placing for loading has not been received as specified in paragraph 4(c), charges for that railroad will commence at the last previous interchange record or record of car having been unloaded, whichever occurs latest.

(e) In all cases specified in this paragraph in which documents are not provided by a railroad which had the MPS unit prior to this Railroad, then unit days on this Railroad shall commence effective with the date indicated by the first record establishing this Railroad's responsibility.

5. Railroad shall make such inspections at its own expense of units while on its line of railroad as may be necessary and proper.

6. While Carline's MPS units are on the lines of Railroad, Railroad shall perform routine servicing of and running repairs to MPS units, including the furnishing of fuel, refrigerant, anti-freeze and other supplies. Railroad may bill Carline, and Carline shall pay Railroad, for services performed and supplies furnished in connection with Carline's MPS units on the following bases:

(a) Fuel oil and kerosene shall be billed at Railroad's cost.

(b) Refrigerant, anti-freeze, supplies and repairs to mechanical units shall be billed as outlined in AAR Interchange Rules.

7. Carline makes no express or implied warranty or representation as to the fitness for use or condition of said units.

8. In the event any unit is damaged or destroyed while upon the lines of Railroad, or in its possession or control, Railroad shall pay Carline the amount prescribed by the Interchange Rules of the Mechanical Division of the Association of American Railroads then in effect.

9. Promptly after its execution, Railroad shall file and submit this agreement to the I.C.C. for its approval pursuant to the provisions of Sec. 1(14)(b) of the Interstate Commerce Act.

10. This agreement shall inure to the benefit of and be binding upon the successors and assigns of the parties hereto. Nothing in this agreement shall confer any rights upon any party other than the parties executing this agreement and their successors and assigns.

11. This agreement shall be effective as of January 1, 1974, upon its approval by the Interstate Commerce Commission, and shall continue in effect until superseded by a new agreement. In the event that Carline and the nation's railroads enter into a uniform agreement, contract or arrangement covering the furnishing of MPS, it is agreed that the parties hereto may terminate this agreement and become parties to such new agreement. This contract shall otherwise continue in effect until terminated by either party on six months' written notice to the other. In the event national standards are adopted relating to any matter provided for herein (e.g., use of origina or reproduction cost values, or other arrangements in recognition of inflationar factors), the parties shall give consideration to such revision of this agreement as ma be appropriate.

12. Upon the effective date of this agreement, any agreements, contracts o arrangements previously in effect between the parties hereto covering the furnishin by Carline of mechanical protective service against heat or cold by the preparin furnishing and servicing of units for use in mechanical refrigerator cars transported b Railroad, shall forthwith terminate; provided, however, that such termination sha not affect any of the rights or obligations of the parties to said agreement which ma have accrued, or liabilities, accrued or otherwise, which may have arisen pri thereto. To the extent that this agreement is inconsistent with Division Sheet 7, sai Division Sheet 7 is hereby superseded.

13. The parties hereto agree to use their best efforts to obtain and mainta compensatory tariff charges for MPS.

IN WITNESS WHEREOF, this agreement has been executed by Carline and Railroad as shown below.

PACIFIC FRUIT EXPRESS COMPAN

Attest: ______________________ By ______________________
Assistant Secretary (Title) Vice President & General Manag

CHICAGO AND NORTH WESTERN
TRANSPORTATION COMPANY

Attest: ______________________ By ______________________
Assistant Secretary (Title) Vice President-Finance

APPENDIX B

Contract for the furnishing of Mechanical Protective Service

THIS AGREEMENT, made and entered into as of the 1st day of January, 1975, by and between PACIFIC FRUIT EXPRESS COMPANY, a corporation of the State of Utah, hereinafter referred to as "Carline", and the undersigned railroad hereinafter referred to as "Railroad";

WITNESSETH:

WHEREAS, Railroad is a common carrier engaged in the transportation of property and as such furnishes protective service against heat or cold; and

WHEREAS, Railroad on occasion furnishes such protective service to shippers by means of Carline's Mechanical Protective Service Units ("Units") in mechanical refrigerator cars; and

WHEREAS, Carline from time to time furnishes mechanical protective service ("MPS") to Railroad by preparing, servicing and furnishing its Units to Railroad; and

WHEREAS, Railroad will compensate Carline for its reasonable costs incurred in furnishing MPS; and

WHEREAS, Railroad expects to recover the amounts paid to Carline by means of a mechanical protective service tariff charge assessed against the Railroad's customer whose shipment receives the protective service, but such recovery shall not be a condition of this contract.

NOW, THEREFORE, in consideration of the mutual covenants hereinafter set forth, the parties hereto agree among themselves as follows:

1. (a) Whenever an MPS Unit in a mechanical refrigerator car owned or leased by Carline is used or required by Railroad to furnish protective service to a perishable shipment transported by Railroad in such car, Railroad shall cause the settling railroad to pay the railroad originating the shipment, and said originating railroad to pay Carline, 80% of the mechanical protective service tariff revenue and other revenues associated with MPS, as now provided in Division Sheet 7, issued by the National Perishable Freight Committee, or such other amount as may be provided in Division Sheet 7, or its equivalent, from time to time.

(b) Carline shall bill Railroad quarterly and Railroad shall pay Carline within 30 days after receipt of such bill the difference between the amount Carline has received in behalf of Railroad (excluding detention allowances) for each shipment supplied mechanical protective service, and Railroad's "quarterly proportionate share" (as defined herein) of the mechanical protective service charge for each such shipment set forth in the attached Table of Allowances (Exhibit A). Said allowances are the tariff charges which were approved by the Interstate Commerce Commission on March 5, 1975, in Ex Parte No. 300 and which were published as Supplement 191 to Perishable Protective Tariff 18, adjusted to January, 1975, cost levels in accordance with the Association of American Railroad's price indices for labor and materials, including fuel. Said allowances shall be further adjusted at the close of each calendar year by applying to all such allowances a percentage representing the proportion by which the combined MPS costs (determined as set forth in paragraph 2(b)), excluding detention allowances, for that year of the three major carlines operating in the United States (being Carline, Fruit Growers Express Company and Western Fruit Express Company) are greater or less than the total of said allowances that were applicable to shipments in cars of said carlines during the same period.

(c) In order to permit Carline to make such billing to Railroad, Railroad agrees and consents that the origin carrier shall furnish Carline promptly with a copy of the Abstract of Interline Revenues Received for each perishable shipment in which Railroad participates, which will show thereon the divisions of revenues received by each railroad from such shipment. If the origin carrier does not do so, Railroad agrees to furnish Carline with said Abstract.

(d) As soon after the end of each calendar year as practicable, Carline shall submit an itemized bill to Railroad, and Railroad shall pay Carline within 30 days after receipt, or if there has been an audit as mentioned in paragraph 3 hereof, within 30 days after the completion of said audit, Railroad's "annual proportionate share" of Carline's deficit, if any, from furnishing mechanical protective service to all railroads, which deficit shall be the excess of Costs as defined in paragraph 2(b) over Revenues as defined in 2(a). In the event Carline has "Earnings" from furnishing mechanical protective service to all railroads, they shall be distributed as set forth in paragraph 1(e).

Carline's annual bill or refund to Railroad shall include a detailed statement of Carline's revenues and costs of supplying MPS determined as herein set forth, less payments by Railroad to Carline pursuant to paragraph 1(b) and an itemized statement of Railroad's "annual proportionate share" of freight revenues for shipments under MPS by all railroads in Carline's cars during the preceding calendar year.

(e) (1) "Earnings" means the excess of the payments made pursuant to paragraph 1(a), over MPS costs, as defined in paragraph 2.

(2) "Profit", as used herein, shall be defined as an annual before-tax profit and shall be composed of the following:

(i) Six percent of the average book cost of the property and equipment employed in furnishing MPS, less the related accrued depreciation;

(ii) In the case of the property and equipment leased by Carline, book cost and depreciation applicable thereto shall be computed and reconstructed on the same basis as applies to Carline's owned property and equipment of similar kinds; and

(iii) An allowance for working capital of six percent of the average cash and cost of material and supply inventories devoted to MPS.

(3) If Carline has Earnings, such Earnings shall be distributed in the following manner: Until Carline has received a Profit, as herein before defined, one-half of Earnings shall be retaind by Carline and Carline shall pay to Railroad its "annual proportionate share" of the other one-half of said Earnings. After Carline has received its Profit, Carline shall pay to Railroad its "annual proportionate share" of all additional Earnings.

(f) Railroad's "quarterly proportionate share" or "annual proportionate share" shall be the same proportion as Railroad has derived from the total line haul freight revenues for shipments under MPS in Carline's cars by all railroads during the applicable quarter, or calendar year, as the case may be.

2. In computing Carline's deficit, Earnings, and Profit, as the case may be, the following revenues and costs shall be taken into account:

(a) Revenues from MPS shall include all amounts received by Carline from all railroads from rendering MPS pursuant to paragraph 1(a) hereof within the United States and Canada.

(b) "Costs", as used herein shall include the following Carline costs of acquisition of Units employed in furnishing MPS, whether by purchase, lease or otherwise, and the costs of preparing, servicing, supplying and inspecting said Units:

(1) Depreciation of owned Units on the basis of 6 percent per annum over a fifteen (15) year period with a 10 percent salvage, or other Interstate Commerce Commission approved rates of depreciation and salvage for MPS Units.

(2) Rentals actually paid or incurred for leased units, except that if any such lease after January 1, 1974, is from an affiliate of Carline, then such rental shall be computed on the basis used in the establishment of such rentals for equipment leased during the period 1963-1971, which permits recovery of the cost of the unit (as reduced by the equivalent before income taxes of any applicable investment tax credit) over 20 years with interest at the average rate of equipment trusts placed on the standard Philadelphia Plan in the year of inception of such lease by such lessor affiliates, plus one tenth of one percent additional interest per year. If no such Philadelphia Plan trusts are placed by such lessor affiliates in the year of inception of such lease, then the interest rate used will be the average rate incurred by lessor affiliates financing with a form and term most nearly similar to a Philadephia Plan equipment trust.

(3) 7.5 percent before income taxes of Carline's depreciated original cost of owned units, equipment, buildings and land, and working capital (including cash and material and supply inventories), which are devoted to MPS (which sum represents a composite rate of interest on borrowed funds and imputed interest in equity).

(4) Depreciation of repair facilities.

(5) Property taxes on units and repair facilities.

(6) Maintenance expense of units and repair facilities.

(7) Fuel costs.

(8) Lubricating oil and other supplies.

(9) Other expenses, including supervision, rent, injuries, insurance, stationery, printing, retirements, payroll taxes and such other and general expenses as may be prescribed in the I.C.C.'s Uniform System of Accounts for Refrigerator Carlines from time to time, provided that such general expenses shall be allocated to MPS in the proportion that MPS operating expenses, less depreciation and retirements, bears to total operating expenses less depreciation and retirements.

(c) Carline's MPS costs shall be determined from the books, records and accounts of Carline which shall be kept in accordance with the Interstate Commerce Commission's Uniform System of Accounts for Refrigerator Carlines, except as specifically provided herein. Carline shall retain all records from which such costs have been obtained for five (5) years following the calendar year of each shipment, and said records during said period shall be available for inspection and copying by Railroad at its expense.

(d) All Carline costs associated with the accounting for and billing of MPS deficits and profits under this contract, and otherwise implementing this contract, shall be deemed to be included under "Other Expenses" of MPS, as set forth in paragraph 2(b) hereof, and shall be allocated entirely to MPS.

3. Railroad or its agent may audit Carline's records so as to verify the accuracy of Carline's costs and revenues. Carline shall cooperate with such audit and make available its books, accounts and records as may reasonably be requested at such

times as are agreed to at Carline's principal office. Said audit shall commence within 90 days after Railroad receives Carline's billing or statement described in paragraph 1(d) hereof. In the event other railroads execute counterparts of this contract with Carline, Railroad and such contracting railroads shall collectively designate an agent, which may be one of their employees or any other person, including an independent certified public accountant, to conduct said audit, it being the intent that only one such audit annually shall be conducted on behalf of Railroad individually or railroads collectively.

4. While Carline's MPS units are on the lines of Railroad, Railroad shall perform such inspections of units as may be necessary and proper, at its own expense. Railroad shall also perform routine servicing and running repairs to MPS units, including the furnishing of fuel, refrigerant, antifreeze and other supplies. Railroad shall bill Carline, and Carline shall pay Railroad, for services performed (but not including inspection) and supplies furnished in connection with Carline's MPS units on the following bases:

(a) Fuel oil and kerosene shall be billed as provided in Division Sheet 7.

(b) Refrigerant, antifreeze, supplies and repairs to mechanical units shall be billed as outlined in AAR Interchange Rules then in effect.

5. Carline makes no express or implied warranty or representation as to the fitness for use or condition of said units.

6. In the event any unit is damaged or destroyed while upon the lines of Railroad, or in its possession or control, Railroad shall pay Carline the amount prescribed by the Interchange Rules of the Mechanical Division of the Association of American Railroads then in effect.

7. Carline agrees to cooperate with Railroads in proceedings instituted by Railroads to recover in MPS charges assessed against the public the full amount paid to Carline. Any costs associated therewith shall be included in "Other Expenses" of MPS, as set forth in paragraph 2(d) hereof, and shall be allocated entirely to MPS.

8. Carline agrees to operate efficiently and economically, and to take every reasonable step to minimize its costs consistent with its provision of MPS. Carline agrees that all allocations of costs between MPS and other aspects of its business shall be fair and reasonable.

9. It is recognized that Carline is owned or controlled by several railroads, and that the regulations of the Interstate Commerce Commission provide: "No contracts shall provide for a charge to a nonproprietary railroad or express company different from that to a proprietary railroad for the same service under substantially similar conditions." In view of this, Carline agrees that the provisions of this contract provide equal and nondiscriminatory treatment to nonproprietary railroads, with respect to the services provided under substantially similar conditions.

10. This Agreement shall inure to the benefit of and be binding upon the successors and assigns of the parties hereto. Nothing in this Agreement shall confer any rights upon any party other than the parties executing this Agreement and their successors and assigns.

11. Any dispute or controversy arising out of or relating to this contract shall be settled by arbitration in accordance with the rules of the American Arbitration Association, and judgment upon the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.

12. Promptly after its execution, Railroad shall file and submit this Agreement to the I.C.C. for its approval pursuant to the provisions of Sec. 1(14)(b) of the Interstate Commerce Act, and Railroad shall diligently prosecute and said application for approval.

13. This Agreement shall be effective as of January 1, 1975, upon its approval by the Interstate Commerce Commission, and shall continue in effect until superseded by a new agreement. In the event that Carline and a majority of the nation's Class I railroads enter into a different agreement, contract or arrangement covering the furnishing of MPS by Carline, it is agreed that the parties hereto shall terminate this Agreement and become parties to such new agreement. Nevertheless, this Agreement or any such new agreement may be terminated by either party by six (6) months' written notice to the other.

IN WITNESS WHEREOF, this Agreement has been executed by Carline and by Railroad on May 13, 1975.

PACIFIC FRUIT EXPRESS COMPANY

Attest:

By: ______________________
Vice President & Treasurer

By ______________________
Secretary

SOUTHERN RAILWAY COMPANY

Attest:

By: ______________________
Arnold B. McKinnon
Vice President-Law

Secretary

APPENDIX C

Contract for the furnishing of mechanical protective service

THIS AGREEMENT is made and entered into as of the 1st day of January, 1973, by, between and among PACIFIC FRUIT EXPRESS COMPANY, a corporation of the State of Utah, hereinafter referred to as "Carline", and the undersigned railroad or railroads hereinafter referred to as "Railroad".

1. (a) Whenever an MPS unit in a mechanical refrigerator car Carline bearing Carline's reporting marks is tendered in interchange to Railroad or is loaded on Railroad's line and such interchanged or loaded car's shipment requires protection against heat or cold, Railroad agrees to pay Carline its cost of any such protective service it performs on Railroad.

(b) Whenever Railroad is obligated to make any payment under paragraph 1(a) and other railroads participating in the movement of the shipment so agree, Railroad shall cause the settling railroad to pay the railroad originating the shipment 95% of the mechanical protective service tariff revenue or such other percentage which may be determined by or readily calculated from Interstate Commerce Commission future proceedings involving tariff protection service charges. In the event said other railroads do not agree, Railroad shall cause the settling carrier to pay the originating railroad in accordance with the applicable division sheet.

(c) Carline shall take all reasonable steps with diligence to collect all MPS revenue due to it under paragraph 1(b) or under the terms of any applicable division sheet (whichever is appropriate), including written demands and institution of legal action, if warranted. Any revenue due Carline remaining uncollected as a result of Carline's failure to exercise diligence in attempting to collect such MPS revenue shall be treated as though collected for purposes of determining Carline's deficit, if any, as defined below, but not for purposes of determining its Earnings and Profit, as defined below.

(d) Carline shall bill Railroad quarterly and Railroad shall pay Carline within 40 days after receipt of the bill the difference between the amount of allowances Carline has received in connection with each shipment handled by Railroad and supplied mechanical protective service and Railroad's "quarterly proportionate share" (as defined herein) of the mechanical protective service charge for each such shipment.

(e) In order to permit Carline to make such billing to Railroad, Railroad agrees and consents that the origin carrier shall furnish Carline promptly with a copy of the Abstract of Interline Revenues Received for each perishable shipment in cars owned or leased by Carline, in which Railroad participates, which will show thereon the divisions of revenues received by each railroad from such shipment, and also a copy of said Abstract for each nonperishable shipment. If the origin carrier does not do so, Railroad agrees to furnish Carline with said Abstract.

(f) As soon after the end of each calendar year as practicable, Carline shall submit an itemized bill to Railroad, and Railroad shall pay Carline within 40 days after receipt, or if there has been an audit as mentioned in paragraph 3 hereof, within 40 days after the completion of said audit, Railroad's "annual proportionate share" (as defined herein) of Carline's deficit, if any, from furnishing mechanical protective service to all railroads in the United States, which deficit shall be the excess of Costs as defined in paragraph 2(b) over Revenues as defined in 2(a). Such deficit, in turn, shall be apportioned over all railroads, both contracting and noncontracting, and Railroad shall be required to absorb only its proportionate share thereof. In the event Carline has "Earnings" (as defined herein) from furnishing mechanical protective service to all railroads, they shall be distributed as set forth in paragraph 1(e).

Carline's annual bill or refund to Railroad shall include a detailed statement of Carline's revenues, pursuant to paragraph 1(a), and costs of supplying MPS determined as set forth in paragraph 2(b), less payments by Railroad to Carline pursuant to paragraph 1(b), and an itemized statement of Railroad's "annual proportionate share" of freight revenues for shipments under MPS by all railroads in Carline's cars during the preceding calendar year.

(g) (1) "Earnings" means the excess of the payments made pursuant to paragraph 2(a), over MPS costs, as defined in paragraph 2(b).

(2) "Profit", as used herein, shall be defined an annual before-tax profit and shall be composed of six percent of the average book cost of owned property and equipment employed in furnishing MPS, less the related accrued depreciation reduced by any investment credit for property or equipment acquired.

(3) If Carline has Earnings, such Earnings shall be distributed in the following manner: Until Carline has received a Profit, as hereinbefore defined, one-half of Earnings shall be retained by Carline and Carline shall pay to Railroad its "annual proportionate share" of the other one-half of said Earnings. After Carline has received its Profit, Carline shall pay to Railroad its "annual proportionate share" of all additional Earnings.

(h) Railroad's "quarterly proportionate share" or "annual proportionate share" shall be the same proportion as Railroad has derived from the total line haul freight revenues for shipments under MPS in cars bearing Carline's reporting marks by all railroads in the United States during the applicable quarter, or calendar year, as the case may be.

2. In computing Carline's deficit, Earnings, and Profit, as the case may be, the following revenues and costs shall be taken into account:

(a) Revenues from MPS shall include all amounts received by Carline from all railroads for rendering MPS in freight cars pursuant to paragraph 1(a) hereof within the United States, which revenues are includible in revenue accounts 116 through 119 of the Uniform System of Accounts for Refrigerator Car Lines.

(b) "Costs", as used herein, shall include the following Carline costs of acquisition of Units employed in furnishing MPS pursuant to paragraph 1(a), whether by purchase, lease or otherwise, and the costs of preparing, servicing and supplying said Units, which costs are includible in expense accounts 301 through 321:

(1) Depreciation of owned Units on the basis of 3.6 percent per annum over a twenty-five (25) year period with a 10 percent salvage.

(2) Rentals actually paid or incurred for leased units, except that if any such lease after January 1, 1974, is from an affiliate of Carline, then such rental shall be computed on the basis used in the establishment of such rentals for equipment leased during the period 1963-1971, which permits recovery of the cost of the unit (as reduced by the equivalent before income taxes of any applicable investment tax credit) over 20 years with interest at the average rate of equipment trusts placed on the standard Philadelphia Plan in the year of inception of such lease by such lessor affiliates, plus one tenth of one percent additional interest per year. If no such Philadelphia Plan trusts are placed by such lessor affiliates in the year of inception of such lease, then the interest rate used will be the average rate incurred by lessor affiliates financing with a form and term most nearly similar to a Philadelphia Plan equipment trust.

(3) 2.54 percent before income taxes of Carline's depreciated original cost of owned units, equipment, buildings and land, which are devoted to MPS.

(4) Depreciation of repair facilities and properties used to repair and service MPS Units, based on normal lives for such properties on straight-line depreciation method.

(5) Property taxes on units and repair facilities for the units.

(6) Payroll taxes on labor costs related to said accounts 301 through 321.

(c) In the event loaded shipments of freight with mechanical protective service units not operating shall account for more than 5 percent of Carline's total loaded shipments, the MPS ownership cost for the year shall be apportioned over total MPS and unit not operating loaded shipments. There shall be excluded from the computation of unit not operating shipments such shipments that are due to return of cars by Railroad following a loaded perishable movement.

(d) Carline's MPS costs shall be determined from the books, records and accounts of Carline which shall be kept in accordance with the Interstate Commerce Commission's Uniform System of Accounts for Refrigerator Carlines, except as specifically provided herein. Carline shall retain all records from which such costs have been obtained for five (5) years following the calendar year of each shipment, and said records during said period shall be available for inspection and copying by Railroad at its expense.

3. Railroad or its agent may audit Carline's records so as to verify the accuracy of Carline's costs and revenues. Carline shall cooperate with such audit and make available its books, accounts and records as may reasonably be requested at such times as are agreed to at Carline's principal office. Said audit shall commence within 90 days after Railroad receives Carline's billing or statement described in paragraph 1(d) hereof. In the event other railroads execute counterparts of this contract with Carline, Railroad and such contracting railroads may collectively designate an agent, which may be one of their employees or any other person, including an independent certified public accountant, to conduct said audit.

4. While Carline's MPS units are on the lines of Railroad, Railroad shall perform such inspections of units as may be necessary and proper, at its own expense. Railroad shall also perform routine servicing and running repairs to MPS units, including the furnishing of fuel, refrigerant, antifreeze and other supplies. Railroad shall bill Carline, and Carline shall pay Railroad, for services performed (but not including inspection) and supplies furnished in connection with Carline's MPS units on the following bases:

(a) Fuel oil, gasoline, and kerosene shall be billed at Railroad's costs.

(b) Refrigerant, antifreeze, supplies and repairs to mechanical units shall be billed at Railroad's costs.

5. Carline warrants that said MPS units are fit for use in MPS service and are in serviceable condition.

6. In the event any unit is damaged or destroyed while upon the lines of Railroad, or in its possession or control, Railroad shall pay Carline the amount prescribed by the Interchange Rules of the Mechanical Division of the Association of American Railroads then in effect.

7. Carline agrees to operate efficiently and economically, and to take every reasonable step to minimize its costs consistent with its providing MPS. Carline agrees that all allocations of costs between MPS and other aspects of its business shall be fair and reasonable.

8. It is recognized that Carline is owned or controlled by several railroads, and that the regulations of the Interstate Commerce Commission provide: "No contracts shall provide for a charge to a nonproprietary railroad or express company different from that to a propericetary railroad for the same service under substantially similar conditions." In view of this, Carline represents and agrees that the provisions of this contract provide equal and nondiscriminatory treatment to nonproprietary railroads, with respect to the services provided under substantially similar conditions. Carline further agrees that it will not enter into any contract, express or implied, which would require any other railroad contracting with Carline to route traffic over or otherwise prefer, in any manner, one or more railroads.

9. Any dispute or controversy arising out of or relating to this contract shall be settled by the Interstate Commerce Commission.

10. Promptly after its execution, Railroad shall file and submit this Agreement to the I.C.C. for its approval pursuant to the provisions of Sec. 1(14)(b) of the Interstate Commerce Act, and Railroad shall diligently prosecute said application for approval.

11. It is recognized that this contract is made pursuant to the aforesaid order of the United States District Court for the Northern District of California, which enjoins the parties herein to enter into a contract based on the 1962 order of the Interstate Commerce Commission in Ex Parte 137. Should that order be changed, modified, or

set aside by order of the Commission or of any Court, either party may terminate this contract by written notice to the other in 30 days from the date of said notice.

12. The terms of this contract are not to constitute an admission of any fact, course of conduct, business practice, or reasonableness of terms of doing business in any pending litigation as between the parties hereto relating to damages in respect to years prior to 1973 for the furnishing of protective service.

13. This Agreement shall be effective as of January 1, 1973, upon its approval by the Interstate Commerce Commission, and shall continue in effect until superseded by a new agreement: Provided, however, if said Commission determines in the case Ex Parte No. 137, *Contracts for Protective Services*, or in any other case as a result of the remand of said entitled case by the United States District Court for the District of Columbia, *Southern Railway Company et al. v. United States et al.*, Civil Action No. 1776-73 that no amount is due from January 1, 1973 to present or that no amount is due as to a part of said period, then any amount paid by Railroad to Carline for the period or periods as to which the Commission finds no amount due shall be repaid to Railroad within 30 days of the Commission's decision.

14. This Agreement or any such new agreement may be terminated by either party by three (3) months' written notice to the other, except as provided in paragraph 11 above.

15. This Agreement in no way restricts any party from seeking change or modification of the regulations promulgated by the Interstate Commerce Commission in 1962 in Ex Parte 137, either in an action before the Commission or before any Court, which action may give right to termination of this contract pursuant to paragraph 11 hereof.

IN WITNESS WHEREOF, this Agreement has been executed by Carline and Railroad on 1976.

PACIFIC FRUIT EXPRESS

Attest:

By ______________________ By ______________________

THE BALTIMORE AND OHIO
RAILROAD CO.

Attest:

By ______________________ By ______________________

THE CHESAPEAKE AND OHIO
RAILWAY COMPANY

By ______________________ By ______________________

Attest:

WESTERN MARYLAND COMPANY

By ______________________ By ______________________

CHICAGO, SOUTH SHORE AND
SOUTH BEND

Attest:

By ______________________ By ______________________

APPENDIX D

Contract for the furnishing of mechanical protective service

THIS AGREEMENT, made and entered into this day of 1976, retroactive to January 1, 1973, by and between **PACIFIC FRUIT EXPRESS COMPANY**, a corporation of the State of Utah, hereinafter referred to as "Carline", and the undersigned railroad hereinafter referred to as "Railroad",

WITNESSETH

WHEREAS, Railroad is a common carrier engaged in the transportation of property that requires protective service against heat or cold, and

WHEREAS, Railroad on occasion furnishes such protective service to shipper by means of Carline's Mechanical Protective Service ("MPS") Units ("Units") in mechanical refrigerator cars, and

WHEREAS, Carline on occasion furnishes said protective service to Railroad by preparing, servicing and furnishing its Units to Railroad in refrigerator cars, and

WHEREAS, Railroad and Carline are required by an outstanding order of the United States District Court in the Northern District of California in a proceeding known as *Pacific Fruit Express v. Akron, Canton and Youngstown R. et al.*, C.A. 44601, to enter into a contract wherein Railroad is to compensate Carline for its reasonable cost incurred in furnishing mechanical protective service, said order being founded on certain regulations promulgated by the Interstate Commerce Commission in a proceeding known as Ex Parte 137, *Contract for Protective Services* on August 27, 1962.

NOW, THEREFORE, in consideration of the mutual covenants hereinafter set forth, the parties hereto agree among themselves as follows:

1. (a) Whenever an **MPS** Unit in a mechanical refrigerator car owned or leased by Carline is used or required by Railroad to furnish protective service to a perishable shipment transported by Railroad in such car, Railroad shall cause the settling railroad to pay the railroad originating the shipment, and said originating railroad to pay Carline, 80% of the mechanical protective service tariff revenue and other revenues associated with **MPS**, as now provided in Division Sheet 8, issued by the National Perishable Freight Committee, or such other amount as may be provided in Division Sheet 8, or its equivalent, from time to time.

(b) Carline shall bill Railroad quarterly and Railroad shall pay Carline within 30 days after receipt of such bill the difference between the amount Carline has received in behalf of Railroad (excluding detention allowances) for each shipment supplied mechanical protective service, and Railroad's "quarterly proportionate share" (as defined herein) of the mechanical protective service charge for each such shipment set forth in the attached Table of Allowances (Exhibit A). Said allowances are the tariff charges which were approved by the Interstate Commerce Commission on March 5, 1975, in Ex Parte No. 300 and which were published as Supplement 191 to Perishable Protective Tariff 18, adjusted to January, 1975, cost levels in accordance with the Association of American Railroad's price indices for labor and materials, including fuel. Said allowances shall be further adjusted at the close of each calendar year by applying to all such allowances a percentage representing the proportion by which the combined **MPS** costs (determined as set forth in paragraph 2(b)), excluding detention allowances, for that year of the three major carlines operating in the United States (being Carline, Fruit Growers Express Company and Western Fruit Express

Company) are greater or less than the total of said allowances that were applicable to shipments in cars of said carlines during the same period.

(c) In order to permit Carline to make such billing to Railroad, Railroad agrees and consents that the origin carrier shall furnish Carline promptly with a copy of the Abstract of Interline Revenues Received for each perishable shipment in which Railroad participates, which will show thereon the divisions of revenues received by each railroad from such shipment. If the origin carrier does not do so, Railroad agrees to furnish Carline with said Abstract.

(d) As soon after the end of each calendar year as practicable, Carline shall submit an itemized bill to Railroad, and Railroad shall pay Carline within 30 days after receipt, or if there has been an audit as mentioned in paragraph 3 hereof, within 30 days after the completion of said audit, Railroad's "annual proportionate share" of Carline's deficit, if any, from furnishing mechanical protective service to all railroads, which deficit shall be the excess of Costs as defined in paragraph 2(b) over Revenues as defined in 2(a). In the event Carline has "Earnings" from furnishing mechanical protective service to all railroads, they shall be distributed as set forth in paragraph 1(e).

Carline's annual bill or refund to Railroad shall include a detailed statement of Carline's revenues and costs of supplying MPS determined as herein set forth, less payments by Railroad to Carline pursuant to paragraph 1(b) and an itemized statement of Railroad's "annual proportionate share" of freight revenues for shipments under MPS by all railroads in Carline's cars during the preceding calendar year.

(e) (1) "Earnings" means the excess of the payments made pursuant to paragraph 1(a), over MPS costs, as defined in paragraph 2.

(2) "Profit", as used herein, is defined as an annual before-tax profit composed of six percent of the average book cost of the property and equipment owned by Carline and employed in furnishing MPS, less related accrued depreciation, plus the cost of material and supply inventories devoted to the furnishing of MPS.

(3) If Carline has earnings in excess of the Profit defined in the foregoing subparagraph (2), Carline shall pay to Railroad its annual proportionate share of those earnings.

(f) Railroad's "quarterly proportionate share" or "annual proportionate share" shall be the same proportion as Railroad has derived from the total line haul freight revenues for shipments under MPS in Carline's cars by all railroads during the applicable quarter, or calendar year, as the case may be.

2. In determining Carline's deficit, Earnings and Profit, the following revenues and costs shall be taken into account:

(a) Revenues for the furnishing of mechanical protective service include all amounts received by Carline from all railroads for rendering MPS pursuant to paragraph 1(a) hereof within the United States.

(b) Costs as used herein include the costs to Carline of ownership, lease, and operation of mechanical Units employed in furnishing MPS as follows:

(a) Depreciation of owned Units on the basis of 4.5 percent per annum over a twenty-year period with a 10 percent salvage.

(2) Rentals actually paid or incurred for leased units, except that if any such lease after January 1, 1974, is from an affiliate of Carline, then such rental shall be

computed on the basis used in the establishment of such rentals for equipment leased during the period 1963-1971, which permits recovery of the cost of the unit (as reduced by the equivalent before income taxes of any applicable investment tax credit) over 20 years with interest at the average rate of equipment trusts placed on the standard Philadephia Plan in the year of inception of such lease by such lessor affiliates, plus one tenth of one percent additional interest per year. If no such Philadelphia Plan trusts are placed by such lessor affiliates in the year of inception of such lease, then the interest rate used will be the average rate incurred by lessor affiliates financing with a form and term most nearly similar to a Philadelphia Plan equipment trust.

(3) Depreciation of repair facilities and properties used to repair and service MPS Units, based on normal lives for such properties on straight-line depreciation method.

(4) Property taxes on Units and repair facilities for the Units.

(5) Maintenance and repair expenses incurred in the upkeep of the Units and the repair facilities for the Units, including direct wages, payroll taxes and allowances of employees engaged directly in such work.

(6) Costs of fuel, lubricating oils, refrigerants, and other supplies necessary to the operation of the Units, to the extent these costs are not billed directly to railroads or their customers. No general expenses, such as supervision, rent, stationery, insurance, salaries of clerks and general officers, severance pay of employees not engaged in MPS, or other such items shall be charged to the furnishing of MPS.

(c) Carline's MPS costs shall be determined from the books, records and accounts of Carline which shall be kept in accordance with the Interstate Commerce Commission's Uniform System of Accounts for Refrigerator Carlines, except as specifically provided herein. Carline shall retain all records from which such costs have been obtained for five (5) years following the calendar year of each shipment, and said records during said period shall be available for inspection and copying by Railroad at its expense.

3. Railroad or its agent may audit Carline's records so as to verify the accuracy of Carline's costs and revenues. Carline shall cooperate with such audit and make available its books, accounts and records as may reasonably be requested at such times as are agreed to at Carline's principal office. Said audit shall commence within 90 days after Railroad receives Carline's billing or statement described in paragraph 1(d) hereof. In the event other railroads execute counterparts of this contract with Carline, Railroad and such contracting railroads shall collectively designate an agent, which may be one of their employees or any other person, including an independent certified public accountant, to conduct said audit, it being the intent that only one such audit annually shall be conducted on behalf of Railroad individually or railroads collectively.

4. While Carline's MPS units are on the lines of Railroad, Railroad shall perform such inspections of units as may be necessary and proper, at its own expense. Railroad shall also perform routine servicing and running repairs to MPS units, including the furnishing of fuel, refrigerant, antifreeze and other supplies. Railroad shall bill Carline, and Carline shall pay Railroad, for services performed (but not including inspection) and supplies furnished in connection with Carline's MPS units on the following bases:

(a) Fuel oil and kerosene shall be billed as provided in Division Sheet 8.

(b) Refrigerant, antifreeze, supplies and repairs to mechanical units shall be billed as outlined in AAR Interchange Rules then in effect.

5. Carline makes no express or implied warranty or representation as to the fitness for use or condition of said units.

6. In the event any unit is damaged or destroyed while upon the lines of Railroad, or in its possession or control, Railroad shall pay Carline the amount prescribed by the Interchange Rules of Mechanical Division of the Association of American Railroads then in effect.

7. Carline agrees to cooperate with this Railroad and other railroads in any proceedings instituted to recover from the shipping public such charges as are necessary to meet the amounts paid under this contract to Carline for MPS.

8. Carline agrees to operate efficiently and economically, and to take every reasonable step to minimize its costs consistent with its provision of MPS. Carline agrees that all allocations of costs between MPS and other aspects of its business shall be fair and reasonable.

9. It is recognized that Carline is owned or controlled by several railroads, and that the regulations of the Interstate Commerce Commission provide: "No contracts shall provide for a charge to a nonproprietary railroad or express company different from that to a proprietary railroad for the same services under substantially similar conditions." In view of this, Carline agrees that the provisions of this contract provide equal and nondiscriminatory treatment to nonproprietary railroads, with respect to the services provided under substantially similar conditions.

10. This Agreement shall inure to the benefit of and be binding upon the successors and assigns of the parties hereto. Nothing in this Agreement shall confer any rights upon any party other than the parties executing this Agreement and their successors and assigns.

11. It is recognized that this contract is made pursuant to the aforesaid order of the United States District Court for the Northern District of California, which enjoins the parties herein to enter into a contract based on the regulations in Ex Parte 137 prescribed by the Interstate Commerce Commission in 1962. Should those regulations be changed, modified, or set aside by order of the Commission or of any Court, either party may terminate this contract by written notice to the other in 30 days from the date of said notice.

12. The terms of this contract are not to constitute an admission of any fact, course of conduct, business practice, or reasonableness of terms of doing business in any pending litigation as between the parties hereto relating to damages in respect to years prior to 1973 for the furnishing of protective service.

13. This Agreement shall be effective as of January 1, 1973, upon its approval by the Interstate Commerce Commission, and shall remain in force until December 31, 1977. Notwithstanding any other provision in this contract, the contract may be extended by mutual agreement beyond December 31, 1977, or it may be terminated by either party by written notice of three months to the other party, except as provided in paragraph 11 hereof.

14. To the extent this Agreement is inconsistent with any earlier agreement affecting MPS, including National Perishable Freight Committee Division Sheets 7 and 8, the latter are hereby superseded.

15. This Agreement in no way restricts any party from seeking change or modification of the regulations promulgated by the Interstate Commerce Commission

in 1962 in Ex Parte 137, either in action before the Commission or any Court, which action may give right to termination of this contract pursuant to paragraph 11 hereof.

IN WITNESS WHEREOF, this Agreement has been executed this day of 1976.

PACIFIC FRUIT EXPRESS COMPANY

ATTEST:

By ____________________ By ____________________
Secretary

(Name of Railroad Company)

ATTEST:

By ____________________ By ____________________
Secretary

APPENDIX E

Contract for the furnishing of Mechanical Protective Service

THIS AGREEMENT is made and entered into as of the 1st day of January, 1973, by, between and among **PACIFIC FRUIT EXPRESS COMPANY**, a corporation of the State of Utah, hereinafter referred to as "Carline", and the undersigned railroad or railroads hereinafter referred to as "Railroad".

1. (a) Whenever a mechanical protective service (MPS) unit in a mechanical refrigerator car Carline bearing Carline's reporting marks is tendered in interchange to Railroad or is loaded on Railroad's line and such interchanged or loaded car's shipment requires protection against heat or cold, Railroad agrees to pay Carline its cost of any such protective service it performs on Railroad.

(b) Whenever Railroad is obligated to make any payment under paragraph 1(a) and other railroads participating in the movement of the shipment so agree, Railroad shall cause the settling railroad to pay the railroad originating the shipment 95 percent of the MPS tariff revenue or such other percentage which may be determined by or readily calculated from Interstate Commerce Commission future proceedings involving tariff protection service charges. In the event said other railroads do not agree, Railroad shall cause the settling carrier to pay the originating railroad in accordance with the applicable division sheet.

(c) Carline shall take all reasonable steps with diligence to collect all MPS revenue due to it under paragraph 1(b) or under the terms of any applicable division sheet (whichever is appropriate), including written demands and institution of legal action, if warranted. Any revenue due Carline remaining uncollected as a result of Carline's failure to exercise diligence in attempting to collect such MPS revenue shall be treated as though collected for purposes of dètermining Carline's deficit, if any, as defined below, but not for purposes of determining its Earnings and Profit, as defined below.

(d) Carline shall bill Railroad quarterly and Railroad shall pay Carline within 40 days after receipt of the bill the difference between the amount of allowances Carline has received in connection with each shipment handled by Railroad and supplied MPS and Railroad's "quarterly proportionate share" (as defined herein) of the MPS charge for each such shipment.

(e) In order to permit Carline to make such billing to Railroad, Railroad agrees and consents that the origin carrier shall furnish Carline promptly with a copy of the Abstract of Interline Revenues Received for each perishable shipment in cars owned or leased by Carline, in which Railroad participates, which will show thereon the divisions of revenues received by each railroad from such shipment, and also a copy of said Abstract for each nonperishable shipment. If the origin carrier does not do so, Railroad agrees to furnish Carline with said Abstract.

(f) As soon after the end of each calendar year as practicable, Carline shall submit an itemized bill to Railroad, and Railroad shall pay Carline within 40 days after receipt, or if there has been an audit as mentioned in paragraph 3 hereof, within 40 days after the completion of said audit, Railroad's "annual proportionate share" (as defined herein) of Carline's deficit, if any, from furnishing MPS to all railroads, which deficit shall be the excess of Costs as defined in paragraph 2(b) over Revenues as defined in 2(a). Such deficit, in turn, shall be apportioned over all railroads, both contracting and noncontracting, and Railroad shall be required to absorb only its proportionate share thereof. In the event Carline has "Earnings" (as defined herein) from furnishing MPS to all railroads, they shall be distributed as set forth in paragraph 1(e).

Carline's annual bill or refund to Railroad shall include a detailed statement of Carline's revenues, pursuant to paragraph 1(a), and costs of supplying MPS determined as set forth in paragraph 2(b), less payments by Railroad to Carline pursuant to paragraph 1(b), and an itemized statement of Railroad's "annual proportionate share" of freight revenues for shipments under MPS by all railroads in Carline's cars during the preceding calendar year.

(g)(1) "Earnings" means the excess of the payments made pursuant to paragraph 2(a), over MPS costs, as defined in paragraph 2(b).

(2) "Profit", as used herein, shall be defined an annual before-tax profit and shall be composed of 6 percent of the average book cost of property and equipment employed in furnishing MPS, less the related accrued depreciation reduced by any investment credit for property or equipment acquired.

(3) If Carline has Earnings, such Earnings shall be distributed in the following manner: Until Carline has received a Profit, as hereinbefore defined, one-half of Earnings shall be retained by Carline and Carline shall pay to Railroad its "annual proportionate share" of the other one-half of said Earnings. After Carline has received its Profit, Carline shall pay to Railroad its "annual proportionate share" of all additional Earnings.

(h) Railroad's "quarterly proportionate share" or "annual proportionate share" shall be the same proportion as Railroad has derived from the total line-haul freight revenues for shipments under MPS in cars bearing Carline's reporting marks by all railroads during the applicable quarter, or calendar year, as the case may be.

2. In computing Carline's deficit, Earnings, and Profit, as the case may be, the following revenues and costs shall be taken into account:

(a) Revenues from MPS shall include all amounts received by Carline from all railroads for rendering MPS in freight cars pursuant to paragraph 1(a) hereof, which revenues are includible in revenue accounts 116, 118, and 119 of the Uniform System of Accounts for Refrigerated Car Lines.

(b) "Costs", as used herein, shall include the following Carline costs of acquisition of Units employed in furnishing MPS pursuant to paragraph 1(a), whether by purchase, lease, or otherwise, and the costs of preparing, servicing and supplying said Units, which costs are includible in expense accounts 301 through 321:

(1) Depreciation of owned Units on the basis of 3.6 percent per annum over a twenty-five (25) year period with a 10-percent salvage.

(2) Rentals actually paid or incurred for leased units, except that if any such lease after January 1, 1974, is from an affiliate of Carline, then such rental shall be computed on the basis used in the establishment of such rentals for equipment leased during the period 1963-1971, which permits recovery of the cost of the unit (as reduced by the equivalent before income taxes of any applicable investment tax credit) over 20 years with interest at the average rate of equipment trusts placed on the standard Philadelphia Plan in the year of inception of such lease by such lessor affiliates, plus one-tenth of 1 percent additional interest per year. If no such Philadelphia Plan trusts are placed by such lessor affiliates in the year of inception of such lease, then the interest rate used will be the average rate incurred by lessor affiliates financing with a form and term most nearly similar to a Philadelphia Plan equipment trust.

(3) 7.5 percent before income taxes of Carline's depreciated original cost of owned units, equipment, buildings and land, which are devoted to MPS.

(4) Depreciation of repair facilities and properties used to repair and service MPS Units, based on normal lives for such properties on straight-line depreciation method.

(5) Property taxes on units and repair facilities for the units.

(6) Payroll taxes on labor costs related to said accounts 301 through 321.

(7) Other expenses, including supervision, rent, injuries, insurance, stationery, printing, retirements, payroll taxes and such other and General Expenses as may be prescribed in the ICC's Uniform System of Accounts for Refrigerator Carlines from time to time, provided that such general expenses shall be allocated to MPS in the proportion that MPS operating expenses, less depreciation and retirements, bears to total operating expenses less depreciation and retirements, and provided further, that identifiable expenses, not related to MPS, as for example severance payments to employees not engaged in matters relating to MPS, shall be excluded from the above allocation.

(c) In the event loaded shipments of freight with MPS units not operating shall account for more than 10 percent of Carline's total loaded shipments, the MPS ownership cost for the year shall be apportioned over total MPS and unit not operating loaded shipments. There shall be excluded from the computation of unit not operating shipments such shipments that are due to return of cars by Railroad following a loaded perishable movement.

(d) Carline's MPS costs shall be determined from the books, records, and accounts of Carline which shall be kept in accordance with the Interstate Commerce Commission's Uniform System of Accounts for Refrigerator Carlines, except as specifically provided herein. Carline shall retain all records from which such costs have been obtained for five (5) years following the calendar year of each shipment, and said records during said period shall be available for inspection and copying by Railroad at its expense.

3. Railroad or its agent may audit Carline's records so as to verify the accuracy of Carline's costs and revenues. Carline shall cooperate with such audit and make

available its books, accounts, and records as may reasonably be requested at such times as are agreed to at Carline's principal office. Said audit shall commence within 90 days after Railroad receives Carline's billing or statement described in paragraph 1(d) hereof. In the event other railroads execute counterparts of this contract with Carline, Railroad and such contracting railroads may collectively designate an agent, which may be one of their employees or any other person, including an independent certified public accountant, to conduct said audit.

4. While Carline's MPS units are on the lines of Railroad, Railroad shall perform such inspections of units as may be necessary and proper, at its own expense. Railroad shall also perform routine servicing and running repairs to MPS units, including the furnishing of fuel, refrigerant, antifreeze and other supplies. Railroad shall bill Carline, and Carline shall pay Railroad, for services performed (but not including inspection) and supplies furnished in connection with Carline's MPS units on the following bases:

(a) Fuel oil, gasoline, and kerosene shall be billed at Railroad's costs.

(b) Refrigerant, antifreeze, supplies, and repairs to mechanical units shall be billed at Railroad's costs.

5. Carline makes no express or implied warranty or representation as to the fitness for use or condition of said units.

6. In the event any unit is damaged or destroyed while upon the lines of Railroad, or in its possession or control, Railroad shall pay Carline the amount prescribed by the Interchange Rules of the Mechanical Division of the Association of American Railroads then in effect.

7. Carline agrees to operate efficiently and economically and to take every reasonable step to minimize its cost consistent with its providing MPS. Carline agrees that all allocations of costs between MPS and other aspects of its business shall be fair and reasonable.

8. It is recognized that Carline is owned or controlled by several railroads, and that the regulations of the Interstate Commerce Commission provide: "No contracts shall provide for a charge to a nonproprietary railroad or express company different from that to a proprietary railroad for the same service under substantially similar conditions." In view of this, Carline represents and agrees that the provisions of this contract provide equal and nondiscriminatory treatment to nonproprietary railroads, with respect to the services provided under substantially similar conditions. Carline further agrees that it will not enter into any contract, express or implied, which would require any other railroad contracting with Carline to route traffic over or otherwise prefer, in any manner, one or more railroads.

9. Any dispute or controversy arising out of or relating to this contract shall be settled by the Interstate Commerce Commerce.

10. Promptly after its execution, Railroad shall file and submit this Agreement to the I.C.C. for its approval pursuant to the provisions of section 1(14)(b) of the Interstate Commerce Act, and Railroad shall diligently prosecute said application for approval.

11. The terms of this contract are not to constitute an admission of any fact, course of conduct, business practice, or reasonableness of terms of doing business in any pending litigation as between the parties hereto relating to damages in respect to years prior to 1973 for the furnishing of protective service."[3]

12. This Agreement or any such new agreement may be terminated by either party by three (3) months' written notice to the other, except as provided in paragraph 11 above.

13. This Agreement is no way restricts any party from seeking change or modification of the regulations promulgated by the Interstate Commerce Commission in 1962 in Ex Parte No. 137, either in an action before the Commission or before any court.

IN WITNESS WHEREOF, this Agreement has been executed by Carline and Railroad on ____________________, 1976.

PACIFIC FRUIT EXPRESS

Attest:

By: ________________ By: ________________

THE BALTIMORE AND OHIO RAILROAD CO.

Attest:

By: ________________ By: ________________

THE CHESAPEAKE AND OHIO RAILWAY COMPANY

By: ________________ By: ________________

WESTERN MARYLAND COMPANY

Attest:

By: ________________ By: ________________

CHICAGO, SOUTH SHORE AND SOUTH BEND

Attest:

By: ________________ By: ________________

APPENDIX F

Contract for the furnishing of Mechanical Protective Service

THIS AGREEMENT, made and entered into this day of 1976, retroactive to January 1, 1973, by and between PACIFIC FRUIT EXPRESS COMPANY, a corporation of the State of Utah, hereinafter referred to as "Carline", and the undersigned railroad hereinafter referred to as "Railroad";

WITNESSETH:

WHEREAS, Railroad is a common carrier engaged in the transportation of property that requires protective service against heat or cold; and

WHEREAS, Railroad on occasion furnishes such protective service to shipper by means of Carline's Mechanical Protective Service ("MPS") Units ("Units") in mechanical refrigerator cars, and

WHEREAS, Carline on occasion furnishes said protective service to Railroad by preparing, servicing and furnishing its Units to Railroad in refrigerator cars; and

WHEREAS, Railroad and Carline are required by an outstanding order of the United States District Court in the Northern District of California in a proceeding known as *Pacific Fruit Express* v. *Akron, Canton and Youngstown R. et al.*, C.A 44601, to enter into a contract wherein Railroad is to compensate Carline for its reasonable cost incurred in furnishing MPS, said order being founded on certain regulations promulgated by the Interstate Commerce Commission in a proceeding known as Ex Parte No. 137, *Contracts for Protective Services*, on August 27, 1962.

NOW, THEREFORE, in consideration of the mutual covenants hereinafter set forth, the parties hereto agree among themselves as follows:

1.(a) Whenever an MPS Unit in a mechanical refrigerator car owned or leased by Carline is used or required by Railroad to furnish protective service to a perishable shipment transported by Railroad in such car, Railroad shall cause the settling railroad to pay the railroad originating the shipment, and said originating railroad to pay Carline, 80% of the MPS tariff revenue and other revenues associated with MPS, as now provided in Division Sheet 8, issued by the National Perishable Freight Committee, or such other amount as may be provided in Division Sheet 8, or its equivalent, from time to time.

(b) Carline shall bill Railroad quarterly and Railroad shall pay Carline within 30 days after receipt of such bill the difference between the amount Carline has received in behalf of Railroad (excluding detention allowances) for each shipment supplied mechanical protective service, and Railroad's "quarterly proportionate share" (as defined herein) of the mechanical protective service charge for each such shipment set forth in the attached Table of Allowances (exhibit A). Said allowances are the tariff charges which were approved by the Interstate Commerce Commission on March 5, 1975, in Ex Parte No. 300 and which were published as Supplement 191 to Perishable Protective Tariff 18, adjusted to January, 1975, cost levels in accordance with the Association of American Railroad's price indexes for labor and materials, including fuel. Said allowances shall be further adjusted at the close of each calendar year by applying to all such allowances a percentage representing the proportion by which the combined MPS costs (determined as set forth in paragraph 2(b)), excluding detention allowances, for that year of the three major carlines operating in the United States (being Carline, Fruit Growers Express Company, and Western Fruit Express Company) are greater or less than the total of said allowances that were applicable to shipments in cars of said carlines during the same period.

(c) In order to permit Carline to make such billing to Railroad, Railroad agrees and consents that the origin carrier shall furnish Carline promptly with a copy of the Abstract of Interline Revenues Received for each perishable shipment in which Railroad participates, which will show thereon the divisions of revenues received by each railroad from such shipment. If the origin carrier does not do so, Railroad agrees to furnish Carline with said Abstract.

(d) As soon after the end of each calendar year as practicable, Carline shall submit an itemized bill to Railroad, and Railroad shall pay Carline within 30 days after receipt, or if there has been an audit as mentioned in paragraph 3 hereof, within 30 days after the completion of said audit, Railroad's "annual proportionate share" of Carline's deficit, if any, from furnishing mechanical protective service to all railroads, which deficit shall be the excess of costs as defined in paragraph 2(b) over Revenues as defined in 2(a). In the event Carline has "Earnings" from furnishing mechanical protective service to all railroads, they shall be distributed as set forth in paragraph 1(e).

Carline's annual bill or refund to Railroad shall include a detailed statement of Carline's revenues and costs of supplying MPS determined as herein set forth, less payments by Railroad to Carline pursuant to paragraph 1(b) and an itemized statement of Railroad's "annual proportionate share" of freight revenues for shipments under MPS by all railroads in Carline's cars during the preceding calendar year.

(e)(1) "Earnings" means the excess of the payments made pursuant to paragraph 1(a), over MPS costs, as defined in paragraph 2.

(2) "Profit", as used herein, is defined as an annual before-tax profit composed of 6 percent of the average book cost of the property and equipment of Carline employed in furnishing MPS, less related accrued depreciation, plus the cost of material and supply inventories devoted to the furnishing of MPS.

(3) If Carline has earnings in excess of the Profit defined in the foregoing subparagraph (2), Carline shall pay to Railroad its annual proportionate share of those earnings.

(f) Railroad's "quarterly proportionate share" or "annual proportionate share" shall be the same proportion as Railroad has derived from the total line-haul freight revenues for shipments under MPS in Carline's cars by all railroads during the applicable quarter, or calendar year, as the case may be.

2. In determining Carline's deficit, Earnings and Profit, the following revenues and costs shall be taken into account:

(a) Revenues for the furnishing of MPS include all amounts received by Carline from all railroads for rendering MPS pursuant to paragraph 1(a) hereof.

(b) Cost as used herein include the costs to Carline of ownership, lease, and operation of mechanical Units employed in furnishing MPS as follows:

(1) Depreciation of owned Units on the basis of 4.5 percent per annum over a 20-year period with a 10-percent salvage.

(2) Rentals actually paid or incurred for leased units, except that if any such lease after January 1, 1974, is from and affiliate of Carline, then such rental shall be computed on the basis used in the establishement of such rentals for equipment leased during the period 1963-1971, which permits recovery of the cost of the unit (as reduced by the equivalent before income taxes of any applicable investment tax credit) over 20 years with interest at the average rate of equipment trusts placed on the standard Philadelphia Plan in the year of inception of such lease by such lessor affiliates, plus one-tenth of 1 percent additional interest per year. If no such Philadelphia Plan trusts are placed by such lessor affiliates in the year of inception of such lease, then the interest rate used will be the average rate incurred by lessor affiliates financing with a form and term most nearly similar to a Philadelphia Plan equipment trust.

(3) Depreciation of repair facilities and properties used to repair and service MPS Units, based on normal lives for such properties on straight-line depreciation method.

(4) Property taxes on Units and repair facilities for the Units.

(5) Maintenance and repair expenses incurred in the upkeep of the Units and the repair facilities for the Units, including direct wages, payroll taxes and allowances of employees engaged directly in such work.

(6) Costs of fuel, lubricating oils, refrigerants, and other supplies necessary to the operation of the Units, to the extent these costs are not billed directly to railroads or their cutomers.

(7) 7.5 percent before income taxes of Carline's depreciated original cost of owned units, equipment, buildings, and land, which are devoted to MPS.

(8) Other expenses, including supervision, rent, injuries, insurance, stationery, printing, retirements, payroll taxes and such other and General Expenses as may be prescribed in the ICC's Uniform System of Accounts for Refrigerator Carlines from time to time, provided that such general expenses shall be allocated to MPS in the proportion that MPS operating expenses, less depreciation and retirements, bears to total operating expenses less depreciation and retirements, and provided further, that identifiable expenses, not related to MPS, as for example severance payments to employees not engaged in matters relating to MPS, shall be excluded from the above allocation.

(c) Carline's MPS costs shall be determined from the books, records, and accounts of Carline which shall be kept in accordance with the Interstate Commerce Commission's Uniform System of Accounts for Refrigerator Carlines, except as specifically provided herein. Carline shall retain all records from which such costs have been obtained for five (5) years following the calendar year of each shipment, and said records during said period shall be available for inspection and copying by Railroad at its expense.

3. Railroad or its agent may audit Carline's records so as to verify the accuracy of Carline's costs and revenues. Carline shall cooperate with such audit and make available its books, accounts, and records as may reasonably be requested at such times as are agreed to at Carline's principal office. Said audit shall commence within 90 days after Railroad receives Carline's billing or statement described in paragraph 1(d) hereof. In the event other railroads execute counterparts of this contract with Carline, Railroad and such contracting railroads shall collectively designate an agent, which may be one of their employees or any other person, including an independent certified public accountant, to conduct said audit, it being the intent that only one such audit annually shall be conducted on behalf of Railraod individually or railroads collectively.

4. While Carline's MPS units are on the lines of Railroad, Railroad shall perform such inspections of units as may be necessary and proper, at its own expense. Railroad shall also perform routine servicing and running repairs to MPS units, including the furnishing of fuel, refrigerant, antifreeze, and other supplies. Railroad shall bill Carline, and Carline shall pay Railroad, for services performed (but not including inspection) and supplies furnished in connection with Carline's MPS units on the following bases:

(a) Fuel oil and kerosene shall be billed as provided in Division Sheet 8.

(b) Refrigerant, antifreeze, supplies and repairs to mechanical units shall be billed as outlined in AAR Interchange Rules then in effect.

5. Carline makes no express or implied warranty or representation as to the fitness for use or condition of said units.

6. In the event any unit is damaged or destroyed while upon the lines of Railroad, or in its possession or control, Railroad shall pay Carline the amount prescribed by the Interchange Rules of Mechanical Division of the Association of American Railroads then in effect.

7. Carline agrees to cooperate with this Railroad and other railroads in any proceedings instituted to recover from the shipping public such charges as are necessary to meet the amounts paid under this contract to Carline for MPS.

8. Carline agrees to operate efficiently and economically, and to take every reasonable step to minimize its costs consistent with its provision of MPS. Carline agrees that all allocations of costs between MPS and other aspects of its business shall be fair and reasonable.

9. It is recognized that Carline is owned or controlled by several railroads, and that the regulations of the Interstate Commerce Commission provide: "No contracts shall provide for a charge to a nonproprietary railroad or express company different from that to a proprietary railroad for the same services under substantially similar conditions." In view of this, Carline agrees that the provisions of this contract provide equal and nondiscriminatory treatment to nonproprietary railroads, with respect to the services provided under substantially similar conditions.

10. This Agreement shall inure to the benefit of and be binding upon the successors and assigns of the parties hereto. Nothing in this Agreement shall confer any rights upon any party other than the parties executing this Agreement and their successors and assigns.

11. The terms of this contract are not to constitute an admission of any fact, course of conduct, business practice, or reasonableness of terms of doing business in any pending litigation as between the parties hereto relating to damages in respect to years prior to 1973 for the furnishing of protective service.

12. To the extent this Agreement is inconsistent with any earlier agreement affecting MPS, including National Perishable Freight Committee Division Sheets 7 and 8, the latter are hereby superseded.

13. This Agreement in no way restricts any party from seeking change or modification of the regulations promulgated by the Interstate Commerce Commission in 1962 in Ex Parte No. 137, either in action before the Commission or any court.

IN WITNESS WHEREOF, this Agreement has been executed this day of 1976.

PACIFIC FRUIT EXPRESS COMPANY

ATTEST:

By ________________________ By ________________________
Secretary

(Name of Railroad Company)

ATTEST:

By ________________________ By ________________________
Secretary

best copy available

APPENDIX G

The June 9, 1976, order is applicable to the following railroads.

- Baltimore and Ohio Railroad Company
- Boston and Maine Corporation, and trustees thereof
- Canadian National Railways
  - Central Vermont Railway Incorporated
- Canadian Pacific Railway
- Chesapeake and Ohio Railway Company
- Chicago, Milwaukee, St. Paul & Pacific Railroad Company
- Chicago, Rock Island and Pacific Railroad Company[1]
- Chicago South Shore and South Bend Railroad
- Detroit, Toledo and Ironton Railroad Company
- Illinois Central Gulf Railroad Company
- Illinois Terminal Railroad Company
- Indiana Harbor Belt Railroad Company
- Long Island Railroad Company
- Maine Central Railroad Company
- Norfolk and Western Railway
  - Akron, Canton & Youngstown Railroad Company
  - Delaware and Hudson Railway Company
- Quanah, Acme & Pacific Railway Company
- St. Louis-San Francisco Railway Company
- Toledo, Peoria and Western Railroad Company
- Western Maryland Railway Company

APPENDIX H

The following railroads filed contracts with PFE long after the 30-day period had expired:

- Baltimore and Ohio Railroad Company
- Chesapeake and Ohio Railway Company
- Chicago, Milwaukee, St. Paul & Pacific Railroad Company
- Chicago South Shore and South Bend Railroad
- Detroit, Toledo and Ironton Railroad Company
- Illinois Central Gulf Railroad Company
- Long Island Railroad Company
- Maine Central Railroad Company
- Norfolk and Western Railway
  - Akron, Canton & Youngstown Railroad Company
  - Delaware and Hudson Railway Company
- Toledo, Peoria and Western Railroad Company
- Western Maryland Railway Company

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[1] This defendant commenced reorganization in March, 1975, but its trustee has not been joined as a defendant. PFE intends to file a motion to effect such joinder.

TITLE 49 - TRANSPORTATION
CHAPTER X - INTERSTATE COMMERCE COMMISSION
SUBCHAPTER A - GENERAL RULES AND REGULATIONS
PART 1032 - CONTRACTS FOR PROTECTIVE SERVICES

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D.C., on the 6th day of June 1977.

EX PARTE NO. 137

CONTRACTS FOR PROTECTIVE SERVICES

It appearing, That upon referral of the order of June 9, 1976, of the United States District Court for the Northern District of California, the Commission was directed to approve, disapprove, or modify proposed mechanical protective service contracts to determine whether they complied with our reports and orders in this proceeding at 318 I.C.C. 111 (1962), and 340 I.C.C. 754 (1972) and the court's injunctive judgment and order, 355 F. Supp. 700 (N.D. Calif. 1973), affirmed 524 F. 2d 1025 (9th Cir. 1975), cert. denied 424 U.S. 911 (1976).

It further appearing, That petitions for approval of proposed mechanical protective service contracts were filed on June 29, 1976, by Pacific Fruit Express Company (PFE) which contained the CNW (appendix A) and Southern (appendix B) proposed contracts; on July 8, 1976, by the Norfolk and Western; on July 9, 1976, by certain defendants which contained the Chessie System (appendix C) and the Illinois Central (appendix D) proposed contracts and the divisional proposal; on July 29, 1976 by the Rock Island; and on August 16, 1976, as a supplement to the petition of certain defendants, by the Chicago, Milwaukee, St. Paul & Pacific Railroad Company.

And it further appearing, That some of the defendants listed in the district court's June 9, 1976, order submitted proposed mechanical protective service contracts with PFE long after the 30-day period in which to submit such contracts had expired (appendix H):

Wherefore:

It is ordered, That the CNW and Southern proposed contracts (appendixes A and B) be, and they are hereby, approved.

It is further ordered, That the divisional proposal and the Norfolk and Western, the Chessie System, Illinois Central, the Rock Island and the Chicago, Milwaukee, St. Paul & Pacific Railroad Company proposed contracts be, and they are hereby, disapproved.

It is further ordered, That modified Chessie System and Illinois Central contracts (appendixes E and F) be, and they are hereby, approved.

It is further ordered, That the request of certain defendants for oral hearing and the request of the Norfolk and Western for consolidation of these petitions with the Petition for Rulemaking and Modification and Clarification of the Rules filed on June 14, 1976, by certain eastern railroads be, and they are hereby, denied.

It is further ordered, That PFE and all defendants listed in the district court's June 9, 1976 order who did not submit contracts with PFE after the district court's 30-day period, enter into one of the approved contracts (appendixes A, B, E, and F) within 45 days from the date of service.

It is further ordered, That should the Commission not approve any of the contracts between PFE and the defendants listed in appendix H who filed contracts with PFE after the district court's 30-day period, PFE and the involved defendants shall enter into one of the approved contracts (appendixes A, B, E, and F) within 45 days from the date of service of such order.

And it is further ordered, That a copy of this order shall be delivered to the Director, Office of the Federal Register, for publication therein.

This decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

353 I.C.C.

RELEASED RATES ORDER NO. MC-661

GENERAL COMMODITIES, MOVING IN EXPRESS SERVICE, LESS-THAN-TRUCKLOAD CLASS AND COMMODITY RATES (MIDWEST MOTOR CARRIERS BUREAU, INC., AGENT) REVOCATION OF RELEASED RATES ORDER NO. MC-661, AS AMENDED

Decided June 13, 1977

Released Rates Order No. MC-661 authorizing carriers party to agent's tariff under sections 20(11) and 219 of the Interstate Commerce Act to establish and maintain less-than-truckload class and commodity rates for the transportation of property, other than ordinary livestock, moving in express service between points in various States, subject to released valuation found shown to be lawful. Proceeding discontinued.

T. M. Brown and *Max G. Morgan* for applicant.

REPORT AND ORDER OF THE COMMISSION

DIVISION 2, COMMISSIONERS HARDIN, MURPHY, AND CLAPP

BY THE DIVISION:

By Released Rates Order No. MC-661, dated February 15, 1966, Midwest Motor Carriers Bureau, Inc., Agent (hereinafter called the bureau or Middlewest), for and on behalf of member motor carriers, was granted authority to establish and maintain less-than-truckload (LTL) class and commodity rates on general commodities, moving in express service, between specifically enumerated points, subject to released valuation. The base value for purposes of liability was set at $50 per shipment for shipments of 100 pounds or less, and 50 cents per pound for shipments in excess of 100 pounds. The excess value charge was authorized as 20 cents per $100 of value, or fraction thereof, by which a shipment exceeded the base value. On March 26, 1970, Released Rates Order No. MC-661 was amended to include an additional State to the territory involved and to increase the excess value charge to 25 cents per $100 of value or fraction thereof. The bureau currently has authority to publish released rates on general commodities, moving in express service between points in Arkansas, Kansas, Missouri, Nebraska, Oklahoma, and Texas. A number of States were added to the involved carrier's operating areas, and the bureau sought additional released-rates authority to cover the additional States. This authority was denied by division 2 in an order served January 12, 1976. By order served May 14, 1976, Division 2, Acting as an Appellate Division, denied reconsideration and served notice on applicant that Released Rates Order No. MC-661 would be investigated at the earliest practicable time. On June 7, 1976, division 2 ordered the applicant to show cause why Released Rates Order No. MC-661, as amended, should not be rescinded. By order served June 28, 1976, the filing date was extended to August 6, 1976. Applicant replied and included a new application to extend released-rates authority to 14 additional States. The application for additional released-rates authority was served from the immediate proceeding by order dated November 2, 1976.

Middlewest is a tariff bureau publishing rates and charges for express service on behalf of 20 member motor common carriers. Generally, these carriers are authorized to transport "general commodities, moving in express service" from, to, or between specifically enumerated points. Some member carriers, however, are authorized to transport general commodities without the express service limitation although limited to a specified weight per shipment or aggregate shipment or certain specific commodities such as film and frozen foods without any limitation.

The *members characteristically handle small shipments to small towns on a regular timetable* similar to schedules of arrival and departure for bus and airline companies. Generally, any commodity susceptible to transportation in ordinary van-type equipment is accepted, and members provide the requisite degree of special care and security needed for the safe and expeditious transportation of shipments offered.

Customarily, these carriers use part-time billing and rating personnel who oftentimes are feedstore operators, florists, or gas station attendants. These part-time agents provide pickup and delivery service within the city limits or commercial zone served. They are local people well known by citizens of their town and assist customers in making loss and damage claims and otherwise tailor their operations to cater to the needs of the shipping and receiving public.

The member carriers rely on a simple tariff and simple combination express receipt and bill of lading usually involving three major classifications such as general merchandise, which is first class, food and drink items, which are second class, and a third class limited to newspapers, dated publications, and printed matter. "Volume" rates are virtually nonexistent for these carriers. This permits the inexperienced and occasional noncommercial shipper to easily determine the rates and charges for a service and permits the use of part-time billing and rating agents in remote areas and towns at substantial cost savings.

The carriers operate closed-van pickup and delivery vehicles which are locked after each pickup or delivery. The driver of each vehicle is separated from the locked cargo area. In addition, added security precautions are taken at most terminals in the form of burglar alarms, walking security guards after hours of darkness, or closed-circuit television monitoring equipment, or some combination thereof. High-valued items such as CB radios, pocket calculators, tape decks, or small stero units are handled in a manner requiring hand-to-hand signatures from the pickup driver through the line-haul and delivery driver. All agents and principal employees are bonded and prospective employees are given a polygraph test as a condition to employment. Applicant compares the operations of the express carriers to so-called ordinary freight lines which are characterized by use of relatively complex rating and classification systems, irregular dispatch of vehicles, expensive minimum charges ranging from $10 to $13 or more for light-weighted shipments, reluctance to serve small towns with any degree of regularity, and a highly structured classification system and professional rating and billing personnel required to use the classification system at greatly inflated costs.

Applicant urges the concept of express transportation has historically employed released rates in determining rates and charges for express service. It notes, for example, that released rate authorization, when applied to general freight carriers, has been considered on a commodity-by-commodity basis; however, motor express or small package carriers, such as participants in applicant's tariffs, are dissimilar from those carriers providing so-called ordinary freight service in that the released-rates structure applies on all commodities. Applicant stresses this significant difference between general freight service and express service was considered in *Transportation Activities of Arrowhead Freight Lines,* 63 M.C.C. 573 (1955). Ordinary freight service employs rates and charges based on a multitude of classification ratings, exceptions, and rules, whereas express carriers deal with the sporadic noncommercial, and occasional shipper requiring a relatively simple rate structure. Moreover, express carriers use the declared values to inform the carrier of valuable shipments thereby enabling the carrier to provide the required degree of special care and security.

According to applicant, this has allowed its member carriers to provide a reliable and speedy service for all types of commodities on a regular basis at a modest cost. Revocation of presently authorized released rates would require the hiring of additional full-time rating and billing clerks and would more than likely do away with the present rating and billing personnel available to the public in outlying areas. Similarly, revocation of present authorization would deteriorate over-the-road operations as they presently exist. The voluminous additional paperwork which would otherwise be required if released-rates authorization were revoked would substantially curtail the ability of small shipments carriers to provide their service and thereby cancel the effectiveness of the present system.

In addition, applicant states the involved carriers have historically operated under rate schedules based on released valuation in both interstate and intrastate commerce. Rescission of presently authorized released rates on interstate shipments would force the carriers to maintain two completely different billing procedures and express bills. For example, shipments from Amarillo, Tex., to Ralhart, Tex., would use one rate system while shipments from Amarillo to Clayton, N. Mex., would use another rate system. The difference in mileage between the compared moves is about 46 miles.

Applicant argues the standards for approval of released rates as set out in *Released Rates on Stone in the Southeast*, 93 I.C.C. 90 (1924), have been met in the instant proceeding. That proceeding enumerated certain criteria to be followed in approving released-rates applications, namely, that (1) the wide range in the value of the commodity makes the amount of any claim that may arise difficult to estimate; (2) the susceptibility of the traffic to loss or damage is comparatively high; (3) a high ratio of claims to freight charges exists; and (4) a great number and frequency of claims for loss and damage exists.

By virtue of having to transport almost every shipment under a single class rate, applicant contends the traffic clearly has a wide range of values. Applicant's members handle commodities such as dirty linen, cut flowers, live animals, biological specimens, and diamonds and furs ranging in value from $50 to several thousand dollars.

Applicant urges the three remaining criteria are related to the number and frequency of claims paid to dollars received. It presents data pertaining to loss and damage claims obtained from four member carriers, certificated to operate in interstate commerce, namely, Morgan Express, Inc. (Exhibitors), Mistletoe Express Service (Mistletoe), Beaver Express (Beaver), and O&A Tex-Pack Express (O&A) and seven carriers operating in Texas under certificates of registration (Texas). Morgan, for example, accepts almost any commodity for transportation. Cut flowers, fresh foods, candies, vaccines, blood specimens, biological samples, live plants, and animals are representative commodities. Morgan stresses it presently uses a very simple billing and classification system, and its expedited service would deteriorate if it was forced to revert to a more complicated classification system similar to that used by the ordinary freight carriers. It urges that the added expense of additional, trained rate personnel and the possible errors committed by shippers in preparing a shipping document under a complex rating system would defeat the purpose of "express" transportation.

To substantiate the unreasonable exposure to risk, Morgan submitted a traffic study for its Dallas terminal for 1 day. It shows 2,400 shipments consisting of 7,333 pieces averaging about 3 pieces per shipment were handled through the Dallas Terminal. These shipments had a total weight of 147,850 pounds for an average weight of 62 pounds per shipment or 20 pounds per piece and had a value of $50 to $12. About 75 percent of these shipments were tendered with no declared value, i.e., less than $50 in value; the remaining 25 percent of total shipments where a declared value was made and an excess value charge paid had an average value per shipment of approximately $123.59. Morgan also submitted claims data for the month of April. It shows 204 claims were paid. Seventy-five percent of the claims were on shipments with no excess value declared. The remaining 25 percent of the total claims were on shipments with a declared value. The total average claim paid, including shipments on which a value was declared was $47.56. On approximately 8 percent of the shipments made without a declared value, i.e., subject to the $50 maximum liability limit, the claim was only slightly more than $50. A recapitulation of shortage and loss claims submitted by Morgan shows the majority of claims are paid for damage rather than a shortage of the commodity shipped. No ratio of claims to total shipments or ratio of claims to total revenues was given.

Similarly, Exhibitors shows the average weight of shipments handled by it is about 26 pounds per shipment. A substantial majority of its shipments, between 62 and 87 percent, were shipped without a declared value in excess of $50. For the month of May 1976 Exhibitors shows it processed a total of 1,134 claims. Seventy-one percent of these claims were paid. Of the total claims paid, 66 percent of the claims were less than $50 averaging about $21.39 per shipment, 16 percent were over $50 but limited to $50 for damages because no excess value had been declared, and 18 percent were over $50 averaging about $151.14 per shipment. No ratio of claims to total revenues or claims to total number of shipments was given.

Mistletoe operates in intrastate and interstate commerce. It is concerned that the abolition of released rates would increase its rating and billing expense under a complicated classification system to about 35 percent of its total revenue of $17,168,800, or about $5.9 million compared to the $82,500 it incurred for billing and rating expense in 1975. It shows that shipments handled by it ranged in value from about $1 per pound to $4,500 per pound and averaged about 47 pounds per shipment. Approximately 78 percent of shipments tendered to it had no declared value. Mistletoe shows claims data for April and June 1976. In April 1,050 claims were filed with an average value of $42.38 per claim. Seventy-six percent of the claims were filed in an amount less than $50. Claims over $50 averaged about $65 per claim. In June, 1,471 claims were filed with a total average payment per claim of $34.91. Seventy-six percent of the claims for June were for less than $50 and averaged about $16.51 per claim; claims over $50 averaged about $124.20 per claim. Mistletoe also shows the ratio of claims to total revenues for the years 1965 through 1975. Based on that exhibit the ratio of claims to revenues has almost doubled in 10 years and ranges from a low of 1.08 percent in 1965 to a high of 3.33 percent in 1974. Mistletoe compares its ratio of claims to revenues in 1975 of 2.48 percent with a ratio of 1.28 percent for the same year for a so-called ordinary freight carrier. Mistletoe explains its ratio is higher because its traffic is smaller, lighter, more fragile, and, therefore, more susceptible to loss or damage. No data relating total claims to total shipments is given.

Moreover, Mistletoe urges since a substantial portion of its shipments are less than 5 pounds per piece, the post office is one of its principal competitors along with bus express. It notes, for example, that its rates, along with other express carriers, are substantially lower than rates for the same service in bus lines or ordinary freight carriers. It also shows obtaining additional insurance for full liability would present difficulties although it does not otherwise develop its insurance costs. Mistletoe stresses the cancellation of released rates in circumstances would seriously affect its ability to compete.

Beaver, like the other carriers, fears a deterioration in its business if the present released-rates authorization is rescinded. It shows the average shipment for it consists of 2.5 pieces and has a value ranging as high as $800 per pound. From a 1-day traffic study, Beaver shows about 78 percent of its shipments are valued as less than $50. A very small percentage of shipments (less than 3 percent) valued over $50 are in the several-thousand-dollar category. Beaver stresses it is primarily a distribution carrier for wholesalers to retail merchants, and packaging of shipments, therefore, is sometimes of inferior quality. This coupled with the high value of items such as jewelry, coins, and tape decks make the commodities handled highly susceptible to claims. Its principal competitors are parcel post and the bus lines, with occasional competition from United Parcel Service. The net effect of a rate increase would put Beaver at a competitive disadvantage. Beaver states rescission of released rates authorization would force it to raise rates by 20 percent. A claims study submitted by Beaver shows a ratio of claims to revenue in 1975 to be 1.45 percent and for the first 6 months of 1976 to be 2.30 percent. No ratio of the number of claims to total number of shipments is given.

Texas Motor Express Association on behalf of O&A and Texas offers arguments similar to those above and states inquiries with insurance carriers in the State of Texas show the cost for insurance would be approximately 75 cents per $100 of coverage instead of the 25 cents per $100 of coverage the shipper now pays under released valuation. It urges the abolition of the rates based on declared value will result in an increased number of claims and expenses resulting from processing those claims. A 1-day traffic study submitted on behalf of O&A and Texas shows between 77 and 81 percent of shipments handled by these carriers have no declared value or a declared value less than $100. Texas Motor Express Association also offers average claims statistics for all its member carriers for an undisclosed period of time. That exhibit shows total average daily shipments to be 2,921. The average weight of each shipment is about 30 pounds. The total claims filed for the period is 329, or roughly 10 percent of the total shipments.

In addition to that presented above, applicant urges that the principal competitors of its members enjoy released rates and stresses the continuation of released rates for its members is necessary if those members are to remain competitive with carriers such as parcel post, United Parcel Service, and bus lines. *Wearing Apparel, Accessories, Piece Goods—Shulman, Inc.*, 321 I.C.C. 1 (1963) is cited in support. Similarly, applicant emphasizes the high degree of customer satisfaction with members' service. A substantial number of users of the services have filed statements favoring the continuation of the released-rates structure. Most of these users are currently shipping or receiving such inexpensive items as auto parts, electrical, audio and visual equipment, fishing gear, law enforcement goods, and other retail goods in small lots in remote areas of the Midwestern United States. They appraise the current mode of obtaining supplies on short notice as expeditious and efficient since many of the receivers of these commodities do not maintain large inventories of the products they use weekly or monthly. Moreover, if a shipper has an expensive item he wishes to insure, they urge he can purchase additional coverage without penalizing the shipper of lesser valued items through higher rates.

DISCUSSION AND CONCLUSIONS

It appears that since the origin of railroad transportation in this country, common carriers have sought, by provisions in shipping contracts, bills of lading, and tariff publications to limit their common law liability as insurers against loss or damage to property received by them for transportation. Prior to specific legislation, these efforts were largely unrestrained. One method was the so-called "release" whereby rates are maintained dependent upon the value of the property as declared by the shipper or as agreed upon by the shipper for the purpose of determining the rate to be applied. Upon such declaration or agreed value, a shipper was generally estopped from collecting or receiving more than the value declared or agreed upon in case of loss or damage.

By adoption of the "Carmack amendment," 34 Stat. L. 595 (1906), to the Interstate Commerce Act, Congress provided that a common carrier receiving property for transportation in interstate commerce should issue a receipt or bill of lading and be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or any common carrier to which such property might be delivered, or over whose lives such property might pass, and declared that no contract, receipt, rule, or regulation should exempt such common carrier from the liability thereby imposed. Problems developed in the interpretation and application of the Carmack amendment, see *Adams Express Co.* v. *Croninger*, 226 U.S. 491 (1913) and that amendment was modified by the so-called first "Cummins amendment" to provide generally that where goods might be hidden from view by wrapping, boxing, or other means and the carrier was not notified as to the character of the goods, the carrier could require the shipper to specifically state in writing the value of the goods upon which the carrier would not be liable beyond the amount so specifically stated. This Commission was authorized to establish, publish, and maintain rates for transportation, dependent upon the value of the property shipped as specifically stated in writing by the shipper. The first "Cummins amendment" was faultily worded and in 1916 was amended by the so-called "Second Cummins amendment," 39 Stat., 441 (1916), which, among other things, expanded the use of released rates from goods which were merely hidden from view because of wrapping or boxing to baggage carried on passenger trains or boats, or trains or boats carrying passengers, *and* property, except ordinary livestock, received for transportation concerning which the carrier shall have been or shall hereafter be *expressly* authorized or required by this Commission to establish and maintain rates dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value of the property. The effect was to limit liability and recovery to an amount not exceeding the value so declared. In this respect, the "Cummins amendment" was a codification of the common law rule of "full liability." However, the Commission was specifically empowered to order released rates in cases where rates based on a declared or released value would, in the opinion of the Commission, "*be just and reasonable under the circumstances and conditions surrounding the transportation*." Therefore, the purpose of that amendment was not so much to restore the common law rule under which a carrier was forbidden to limit its liability for negligence as it was to control the method by which it was effected. Consequently, no carrier may lawfully publish rates based on the declared or agreed value of the commodity shipped or limit the amount of its liability to the value so declared or agreed upon without specific authority from this Commission.

Although the impact of the second Cummins amendment was considered in two subsequent proceedings, namely, *Express Rates, Practices, Accounts, and Revenues*, 43 I.C.C. 510 (1917), and *Live Stock Classification*, 47 I.C.C. 335 (1917), it was not until *Released Rates on Stone in the Southeast*, 93 I.C.C. 90 (1924) (hereinafter referred to as the *Stone* case), that the Commission laid down certain principles for administering it. Therein division 5 noted where the susceptibility to loss and damage is comparatively high and where the wide range in values for a commodity makes it difficult to estimate the amount of any claim, the carrier is at a disadvantage unless it is permitted to base its liability and its charges on a declaration of value obtained in advance from the shipper.

Therefore, in order to establish a prima facie case under the *Stone* criteria, an applicant must show: (1) a wide range in value of the commodity transported such that the amount of any claim which may arise would be difficult to estimate, (2) a comparatively high susceptibility of the commodity to loss or damage, (3) a relatively high ratio of monies paid in claims to revenues received, and (4) a high ratio of total claims to total shipments handled. These criteria have been recognized continuously in subsequent released rates proceedings. Cf. *Fisher Supply Co.* v. *A. & V. Ry. Co.*, 128 I.C.C. 215, 220 (1927); *General Electric Co.* v. *Aberdeen & Rockfish R. Co.*, 159 I.C.C. 327, 329 (1929); *Saalfield Publishing Co.* v. *Atchison, T. & S. F. Ry. Co.*, 274 I.C.C. 584, 587 (1949); *Released Ratings and Rates on Engines*, 47 M.C.C. 767 (1948) (the first formal proceeding in which an application for released rates was considered for a motor carrier); *Peoples Exp. Co.*, 311 I.C.C. 515, 517 (1960); *Wearing Apparel, Accessories, Piece Goods—Shulman, Inc.*, 321 I.C.C. 1, 4-5 (1963); and *General Commodities—American Delivery Systems*, 351 I.C.C. 760, 764 (1976). From time to time we have recognized certain other and sometimes decisive factors, such as demonstrated compelling competitive need, which furnish additional support for an otherwise meritorious application. See *Wearing Apparel, Accessories, Piece Goods—Shulman, Inc., supra.*

Applicant, in addition to claiming it has met the *Stone* criteria, places particular emphasis on the fact that its members are engaged in small shipment express service and that this factor warrants the continuation of the authority to publish released rates. Although there is nothing in the Carmack amendment, the Cummins amendment or the *Stone* case that suggests that express carriage requires the use of released rates, historically, as noted in *Express Rates, Practices, Accounts, and Revenues, supra,* express service has been associated with released rates:

> For many years, if not from the origin of the express business, the principal express companies, hereinafter called petitioners, maintained rates, dependent upon the value of the property as declared by the shipper, or as agreed upon for the purpose of determining the rate to be applied, by which declaration or agreement the shipper was bound. He was estopped from recovering more than that value in case of loss of or damage to the property. *Adams Express Co. v. Croninger,* 226 U.S., 491.

Section 20(11) of the act merely restates the common law rule that a common carrier is an insurer against loss, damage, or injury to property committed to it for transportation unless the carrier is otherwise relieved from full liability by the Commission. We noted above the criteria which must be presented to warrant departure from this common law rule although the division, in *General Commodities—American Delivery Systems,* 351 I.C.C. 760 (1976), citing *Rocky Mtn. Bureau, Released Val. Min. Charges,* 351 I.C.C. 505 (1976), recognized these four elements are not exclusive since there are other circumstances and considerations such as compelling competitive need and the impact on shippers which are relevant and must be considered.

In the instant proceeding, the issue is whether the released-rates authority previously authorized should be continued or terminated. Hence, while the *Stone* criteria are important in evaluating the evidence of record, we must look to the actual transportation performed to determine whether the released-rates authority at issue has functioned in a just and reasonable manner under the circumstances and conditions surrounding the transportation. Stated somewhat differently, the issue to be resolved is whether the public interest would be best served by a continuation or a termination of the released-rates authority first granted to Midwest, as agent for and on behalf of member motor carriers, on February 15, 1966. The unrebutted evidence of record in this proceeding demonstrates that termination of the released-rates authority would adversely affect small shipment traffic in the area served by carrier members of Midwest. The alternative to continuation of the released-rates authority would appear to be a more complex rate structure, higher rates, and shipper dissatisfaction.

Applicant has, in a limited period of time, submitted an extensive and voluminous record supporting the continuation of released rates. It has shown member carriers transport commodities which have a wide range in values, and which, because of the prevalence of consumer goods, small package size, and frequent interchanges, are highly susceptible to loss and damage. In addition, applicant has demonstrated the continuous use of the authority since its inception over 10 years ago, the commercial success in expediting small shipments with little customer dissatisfaction and strong support from both the shipping and receiving public in favor of continuation of rates based on a declared or released value. Moreover, applicant has demonstrated the principal competitors of its member enjoy similar relief from the full-liability provisions of the act. As such we do not believe the order involved herein should be rescinded.

We, therefore, conclude that the circumstances and conditions surrounding the transportation services provided by applicants' members require the continued maintenance of the released rates authorized by Released Rates Order No. MC-661, as amended.

We find that the circumstances and conditions surrounding the transportation of the involved traffic justify the continued maintenance of rates dependent upon declared or agreed values.

We further find that this is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

VICE CHAIRMAN CLAPP concurs in the result.

It is ordered, That Released Rates Order No. MC-661, as amended, be, and it is hereby, continued in full force and effect.

And it is further ordered, That this proceeding be, and it is hereby, discontinued.

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EX PARTE NO. 320

SPECIAL PROCEDURES FOR MAKING FINDINGS OF MARKET DOMINANCE AS REQUIRED BY THE RAILROAD REVITALIZATION AND REGULATORY REFORM ACT OF 1976

Decided August 20, 1976

Upon investigation, standards and procedures to be used in market dominance determinations adopted as part 1109.1 of Title 49 of the Code of Federal Regulations, subject to further comment of the parties.

Curtis H. Berg, Fred R. Birkholz, Charles W. Burkett, Martin Cassell, Harry L. DeLung, Jr., John H. Doeringer, Joseph D. Feeney, Richard J. Murphy, Joseph J. Nagle, Charles C. Rettberg, Jr., Michael E. Roper, C. Barry Schaefer, James L. Tapley, and *Donald M. Tolmie* for participating railroads.

William R. Allen, Jr., Jerome M. Alper, William L. Bailes, Jr., W. H. Bassett, C. W. Bath, Martin W. Bercovici, George E. Best, Jacob P. Billig, Don A. Boyd, C. Collins Brown, Stanley W. Brown, Robert L. Calhoun, Charles W. Chapman, Albert C. Clark, J. Raymond Clark, William C. Collins, Robert M. Corcoran, Richard B. Cortland, Richard E. Costello, R. S. Cramer, Carol A. Curran, Joseph Dauksys, John F. Donelan, Thomas D. Donis, A. P. Driggs, Kenneth R. Drottar, F. A. D'Zurilla, Robert E. Ferguson, A. William Finke, Sam H. Flint, Maurice A. Frater, Donald A. Frederick, Howard Gould, Donald E. Graham, Robert L. Graves, John Guandolo, Vernon J. Haan, R. E. Harridge, Edmund E. Harvey, John E. Harvey, Van L. Hayes, Jr., Pierce L. Herring, William F. Hoffman, James J. Irlandi, Bruce H. Jackson, William E. Jaudes, James M. Jones, Jr., Terrence D. Jones, John T. Kauffman, L. O. Kimberly, Jr., John H. King, James S. Krzyminski, J. David Lemming, William R. Loney, Dickson R. Loos, David G. Macdonald, A. Mainente, Jr., Baynard Marin, John J. C. Martin, John K. Maser III, George J. Mason, Charles J. McCarthy, Thomas F. McFarland, Jr., John G. McGowan, Paul G. McQuiston, B. Jenkins Middleton, Frederic W. Mild, Edward M. Miller, Paul V. Miller, Charles A. Moran, John Ollweiler, Roy E. Olson, Thomas J.

Regan, David Reichert, Paul E. Roman, Jon R. Roy, William R. Rubbert, Robert L. Schmalz, David M. Schwartz, Ernest Sigeti, T. G. Smith, William K. Smith, Ellwood H. Spencer, Harold E. Spencer, Irwin M. Stelzer, Stephen D. Strauss, F. M. Sullivan, Daniel J. Sweeney, Gary Tabak, A. Wallace Tashima, William B. Thomas, Jr., Samuel J. Thomasson, Jr., Fred H. Tolan, David C. Torrey, A. T. Udrys, John D. Varda, Robert J. Wager, William D. Wagstaffe, Charles A. Washer, Paul P. Watkins, John W. Westhause, Edwin M. Wheeler, Charles G. Wise, Frederic L. Wood, George W. Wright, James D. Zakrajsheck, and *Gilbert G. Zizek* for participating shippers and shipper interests.

Charles A. Tobin for Federal Trade Commission.

William A. Alper, Mark M. Levin, and *Jonathon C. Rose* for United States Department of Justice.

Constance L. Abrams, Barry A. Chasnoff, John H. Ely, and *William A. Kutzke* for United States Department of Transportation.

James H. Lauth for United States Department of Agriculture.

Donald C. Cole, Cary W. Dickieson, Jordon J. Hillman, and *John M. Robinson* for The United States Railway Association.

Milton Z. Kafoglis, William Lilley III, and *Roy A. Nierenberg* for The Council on Wage and Price Stability.

Dellon E. Coker for United States Department of the Army.

Frank E. Polom for The Board of Trade of Chicago, Ill.

Jon C. Hansen for The Board of Trade of Kansas City, Mo.

Robert P. Kane and *Gordon P. MacDougall* for the Commonwealth of Pennsylvania.

Gene J. Carroll for Montana Department of Agriculture.

Gordon E. Bollinger for Montana Public Service Commission.

George H. Morin for North Dakota Public Service Commission.

George F. Mohr for Delaware River Port Authority.

R. P. Clark and *G. E. Strange* for Houston Port Bureau.

Dr. Robert J. Tosterud for Upper Great Plains Transportation Institute.

INTERIM REPORT OF THE COMMISSION

BY THE COMMISSION:

The institution of this rulemaking proceeding was mandated by Congress in section 202 of the "Railroad Revitalization and Regulatory Reform Act of 1976."[1] Therein the Commission is directed to establish rules and procedures for determining whether and when a carrier possesses market dominance over a service rendered or to be rendered at a particular rate or rates. Pursuant to this directive, on March 10, 1976, the Commission issued a Notice of Proposed Rulemaking and Order[2] in which it set out proposed amendments to Title 49 of the Code of Federal Regulations.

---

[1] Public Law 94-210, hereinafter the 4R Act. Portions of section 202 which relate to market dominance are set forth in appendix E.

The amendments[3] contained proposed procedures and requirements to be used in making determinations relating to market dominance. Evidentiary and procedural requirements were set out, as well as a number of factual situations, the showing of any one of which would establish a rebuttable presumption of market dominance on the part of the carrier or carriers involved. All interested parties were invited to participate in the proceeding, and in accordance with congressional intent, the recommendations of the Attorney General and of the Federal Trade Commission were solicited.

GENERAL INTRODUCTION

The Commission's approach as set out in the Notice of Proposed Rulemaking and Order was designed to provide standards and procedures for determining, without administrative delay, whether and when a carrier possesses market dominance over a service. Therein we noted that the legislative history of section 202 of the 4R Act indicates that the Commission is not to be strictly bound by antitrust concepts and precedents. We pointed out that pursuant to the Interstate Commerce Act (the act), as amended by the 4R Act, the Commission must make a market dominance determination within 90 days of the institution of a proceeding in which a rate is challenged as being unreasonably high, and, where suspension of an increased rate is at issue, the determination may be required within 30 days of the rate filing.

As we observed in the Notice, and as contemplated by Congress, the statutory time constraints require that evidence be gathered promptly and measured against reasonable substantive standards. With these time constraints in mind, we proposed the use of rebuttable presumptions which would operate in specified circumstances. The seven factual patterns proposed were designed to create rebuttable presumptions of market dominance in situations where experience has shown that the railroads typically possess such dominance. In any proceeding involving a market dominance determination, establishment of the existence of one or more of the proposed fact patterns would create a rebuttable presumption that the carrier whose rates are in issue has market dominance over the involved traffic or movement. The seven factual situations were proposed as follows:

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[2] A copy of the Notice of Proposed Rulemaking and Order is attached as appendix A.

[3] The original designation of the amendments as 49 CFR 1108, was changed to 49 CFR 1109 in 41 F.R. 12231, March 24, 1976.

> (1) Where the rate in issue has been discussed or considered in proceedings before a rail carrier rate bureau acting under an agreement filed with and approved by the Commission pursuant to section 5b, or the former section 5a, of the Interstate Commerce Act;
>
> (2) Where no other carrier of any mode has handled a significant amount of the involved traffic for at least 1 year preceding the filing of the proposed rates;
>
> (3) Where other carriers of any mode have handled a significant amount of traffic but there is no evidence of actual price competition in the past 3 years;
>
> (4) Where the rate in issue exceeds the rate(s) charged by other carriers offering the same or interchangeable service between points involved by 25 percent or more;
>
> (5) Where the rate in issue exceeds the fully allocated cost of providing the service by 50 percent or more;
>
> (6) Where the distance between origin and destination exceeds 1,500 miles, except that when the involved movement occurs as a single-line movement, market dominance may be presumed where the distance exceeds 1,200 miles, provided, however, in either instance that when a rate is subject to a minimum weight, such minimum weight shall equal or exceed 20 net tons;
>
> (7) Where the commodity moving under the rate in issue customarily moves in bulk shipments.

As the Commission pointed out in the Notice, the first presumption dealing with rate bureaus was based on congressional instructions contained in the Conference Report which accompanied the 4R Act as finally passed. In the Report, the Committee of Conference stated its intention that there should be presumed to be an absence of competition between railroads with respect to any rate discussed or considered under an agreement approved by the Commission pursuant to the new section 5b of the act. The second presumption, dealing with market share, and the third, dealing with pricing behavior, directly addressed the presence or absence of competition. The fourth presumption, dealing with rate relationships, and the fifth, dealing with the concept of monopoly pricing, focused on the carrier's ability to exact a premium for its service. The sixth and seventh presumptions identified service and commodity characteristics of markets where railroads have traditionally been free of effective competition. In addition to the proposed presumptions, the Notice also sets out evidentiary requirements for carriers and complainants.

RESPONSE TO NOTICE OF PROPOSED RULEMAKING AND ORDER

The great majority of the parties filing opening statements and replies in this proceeding[4] support the Commission's approach as set forth in the Notice of Proposed Rulemaking and Order served March 10, 1976. The parties opposed to the Commission's approach are primarily governmental agencies and the railroads. The pleadings of the parties supporting the approach are generally concerned with specific recommendations regarding the proposed regulations contained in the Notice. Parties opposing the approach, on the other hand, have in some instances put forward counterproposals. The positions of the opposing parties will be considered first.

The railroads have proposed an alternative set of regulations which are similar to those of the Commission in format but differ greatly in substance. The railroads set forth three pages of relevant information to be submitted by the parties in proceedings involving determinations of market dominance. In addition to most of the information required in the Commission's Notice, the railroads set out numerous other evidentiary requirements.[5] The railroads would place the burden of producing the evidence set forth in note 5 on the complainant. The carrier involved, on the other hand, would be responsible for providing evidence relating to the Standard Transportation Commodity Code (STCC) number and description of the commodity involved; a description of the points involved in the movement; representative examples of mileage involved in the movement; whether the rate has been approved in a rate bureau proceeding; and whether transportation of the involved commodity is in any instance exempt from regulation pursuant to parts II or III of the Interstate Commerce Act.

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[4] A listing of the parties appears in appendix B.

[5] The evidentiary requirements proposed by the railroads include information pertaining to the location of complainant's shipping or receiving facility; the location of the facility of any other person shipping or receiving a commodity under the involved rate; the name of any other carrier or person actually or potentially available to provide transportation of the involved commodity; tonnage of the commodity involved that was received at or shipped from the facilities of any complainant from all origins and to all destinations for the 2 preceding years, separated by the following categories: proponent rail carrier, other rail carrier, motor common carrier, motor contract carrier, other for-hire motor carrier, private motor carrier, water common carrier, other for-hire water carrier, private water carrier, pipeline, any other means; identification of individual States to which shipments amounting to 5 percent or more (in tons) of total shipments were made in the 2 preceding years; a statement as to whether the complainant has held discussions with other carriers or modes of transportation relating to the provisions of a transportation service covered by the involved rate; copies of all submissions made by the complainant to any rate bureau during the 2 preceding years regarding transportation service for the movement involved; copies of any statements submitted to the Commission in any proceeding during the preceding 2 years in support of any application for authority under part II or part III of the act; and other relevant evidence including potential availability of the involved commodity from other sources, availability of substitute commodities, and evidence as to whether complainant is representative of those alleged to be affected by the involved rate.

Finally, the railroads propose three presumptions of fact. The establishment of the first presumption would conclusively prove effective competition: (1) when a complainant fails to provide the information required, or (2) when less than 80 percent (in tons) of the movement involved was transported by rail during either of the immediately 2 preceding years. The second presumption would establish effective competition absent a preponderance of substantial evidence to the contrary when: (1) less than 80 percent of the traffic to which the rate applies was transported by rail during either of the immediately 2 preceding years; (2) the commodity involved is exempt from regulation pursuant to section 203(b)(6) of the act; or (3) the rate applies to a movement or traffic by means of trailer-on-flatcar (TOFC) or container-on-flatcar (COFC) service. The third presumption would establish an absence of effective competition from other carriers when those carriers have participated in a rate bureau proceeding in which the proposed rate was approved.

The United States Railway Association (USRA) argues that the Commission is starting from the false premise that the railroads dominate the market, and states that the approach should be that competition is the rule unless there is substantial evidence to the contrary. It would require the proponent of a rate to present sufficient evidence to support the existence of competition, and would then shift the burden to the protestant to contradict the proponent's claim. USRA recommends adoption of presumptions that effective competition exists: (1) where the traffic to which the rate applies is exempt under section 203(b)(6), or under section 303(b) and the carrier presents evidence of existing competing water, water-truck, water-rail-truck, or water-rail routes, or where the traffic is TOFC or COFC; and (2) where the carrier filing the rate handled less than 70 percent of the involved traffic during the preceding 2 years. The involved traffic would include shipments of the same or substitute commodities moving to the same destination from other sources of comparable or shorter distances.

The Department of Transportation (DOT) rejects the Commission's approach and proposes its own tests for making determinations of market dominance. First, DOT suggests the following circumstances in which it believes that effective competition should be found: (1) markets served by TOFC/COFC service; (2) markets in which manufactured and semifinished goods move less than 300 miles and weigh less than 30,000 pounds; and (3) markets composed of exempt commodities. Second, it contends that there are circumstances in which intermodal price competition is evident, for example, where common or contract carriers of any mode hold themselves out to move the commodity at a rate comparable (120 percent or less of the rail rate) to that proposed by rail carrier. Third, DOT contends that there are other circumstances in which intermodal competition is evident; such competition would exist, for example, where the rail market share is less than 70 percent of the traffic. Finally, DOT states that there is intramodal competition where neither the proposed rate nor a competing rate has been discussed before a rail rate bureau or where alternative routes are available from at least two other railroads.

The Department of Justice (Justice) agrees with the railroads and DOT that competition, rather than market dominance, characterizes most transportation markets. Justice would modify the Commission's first two proposed presumptions to create presumptions of market dominance:

> (1) Where the rate in issue has been discussed or considered in proceedings before a rail rate bureau by competing rail carriers and those participating carriers collectively carry more than 70 percent, measured in tons, of the involved traffic.
>
> (2) Where no other carrier(s) of any mode(s) has handled more than 30 percent of the involved traffic for the 2 years preceding the filing of the rate; provided that, if the carrier filing the rate can show that other carriers of any mode would enter the market if the Commission would grant them authority, then the presumption is rebutted. Involved traffic shall include shipments of the same commodity or substitute commodities which are moving to the same destination from comparable or shorter distances.

Furthermore, Justice would set up three fact patterns defining areas in which the involved rail carrier would be deemed not to have market dominance. These facts patterns are as follows:

> (1) Where the carrier(s) filing the rate handled less than 70 percent of the involved traffic for 2 years preceding the filing of the rate. Involved traffic shall include shipments of the same commodity or substitute commodities which are moving to the same destination from comparable distances.
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> (2) Where the traffic to which the rate applies is exempt under section 303(b) of the Interstate Commerce Act and the proponent rail carrier(s) offers evidence that competing water, water-truck or water-rail routes are available for the traffic or movement to which the rate applies.

(3) Where motor carriers hold themselves out to carry, at a rate which is 115 percent or less of the proponent rail carrier's existing rate, the traffic to which the rate applies.

With regard to procedure, Justice suggests that if in a reply to a protest of a railroad rate the proponent of the rate alleges that any one of the three fact patterns listed above exists, the existence of that fact pattern would be the sole issue in the hearing. Where the proponent of the rate alleges that it has handled less than 70 percent of the involved traffic, the protestant would bear the burden of collecting data from a random and unbiased sample of all shippers to which the rate applies to establish the contrary. Finally, Justice suggests that reconsideration by the Commission of a finding of effective competition not be commenced until the expiration of a 2-year period following the effective date of the new rate. If at the end of a 2-year period, the rate has risen at least 10 percent relative to the rates of other carriers for the involved traffic, and the proponent rail carrier has lost an insignificant share of traffic, then, *and only then*, would the rail carrier be deemed to have market dominance.

The Federal Trade Commission (FTC) does not favor the use of presumptions, on the ground that they are an unsatisfactory way to determine the presence or absence of competition in an industry that has been regulated over a long period of time. FTC advocates the use of an evaluative procedure based on (1) structure, (2) conduct, and (3) performance, with regard to the market, and suggests that additional information about the following areas will be needed to make determinations with regard to market dominance: (1) barriers to entry, (2) potential entrants into the market, (3) the cost structure of alternative carriers, (4) the number and size distribution of transportation purchasers, and (5) records of rate bureau proceedings.

The Department of Agriculture (Agriculture) states that there should be a rebuttable presumption that market dominance exists, and proposes two tests: (1) market dominance would be presumed if two or more other carriers of any mode have not hauled a significant amount of traffic (30 percent) between the involved origins and destinations for 3 years, and (2) market dominance would be presumed if the proposed rate exceeds the fully allocated cost of providing the service by 50 percent or more.

The Council on Wage and Price Stability (Council) takes the position that the Commission's proposal may thwart the procompetitive objectives of the 4R Act. The Council thinks that there should be an initial rebuttable presumption that competition exists, and that the existence of market dominance should be proven. The Council suggests the following approach: (1) determine the characteristics of significant cases of high rates or rate increases warranting Commission review; (2) allow review only for cases of truly major significance; (3) rank cases in terms of the ratio of the known size of the societal loss to the expected costs of litigation (plus associated costs), and allow prosecution of only those which have benefit/cost ratios exceeding unity. According to the Council, there are three determinants of the societal loss due to excess rates: (1) the size of the price/cost margin measured in terms of dollars per unit of traffic; (2) the amount of traffic (per time period) moving under the rate (measured in units to which the rate applies); and (3) the carrier's price elasticity of demand.

Most of the parties responding to the Commission's Notice of Proposed Rulemaking and Order support the approach taken therein by the Commission.[6] The shippers argue, practically without exception, that the approach adopted by the Commission is in accord with congressional instructions contained in the 4R Act that the Commission establish standards and procedures for determining, without administrative delay, when a carrier possesses market dominance. The Producers Traffic Advisory Committee of the Copper Development Association, Inc., states that the Commission's proposal is responsive to the issue of determining a railroad's dominance over specific commodities in individual markets.

The use of presumptions in market dominance determinations is supported by most of the parties.[7] The Association of Home Appliance Manufacturers, for example, is of the opinion that the presumptions are useful tools that permit quick decisions while not placing an unfair burden on any of the parties involved in a case. National Economic Research Associates, Inc. (NERA), states that rebuttable presumptions provide the best possible means of introducing a measure of focused economic analysis into the decisionmaking process. Amax, Inc., takes the position that the presumptions provide the best protection for the shipping public while at the same time allowing the railroads to show effective competition where it exists. Bethlehem Steel Corporation (Bethlehem) states that the numerous variables in characteristics of service and distribution of traffic are such that the use of presumptions is essential if carriers and shippers are to have adequate direction in formulating and presenting evidence bearing on market dominance. Bethlehem believes that the presumptions constitute the most effective means available for avoiding delay, since parties will, in appropriate cases, be able to rely on a presumption in the preparation of evidence, thereby expediting the administrative proceeding. Thus, the use of presumptions in market dominance determinations assertedly fulfills the statutory requirement that rules provide for practical determinations without administrative delay. The National Cotton Council takes the position that rebuttable presumptions are a useful device that cannot possibly prejudice a carrier since, if there are facts which rebut a presumption in a given situation, the carrier is in the best position to present these facts to the Commission.

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[6] Parties taking this view include Canners League of California; Bethlehem Steel Corporation; National Cotton Council; Commonwealth Edison Company, Detroit Edison Company, Wisconsin Power & Light Company, Consumers Power Company, Pennsylvania Power & Light Company, Rochester Gas & Electric Corp.; Consumers Power Company; Association of Home Appliance Manufacturers; and Potomac Electric Power Company.

[7] The Commonwealth of Pennsylvania, on the other hand, argues that the provisions of the 4R Act which deal with market dominance should be repealed.

A number of parties responding argue that the position taken by the railroads, DOT, and Justice that effective competition should be presumed to exist must be rejected. Farmland Industries, Inc., points out that this position places the burden of proof in future rate adjustments on the shipper rather than on the carrier, contrary to judicial and Commission precedent. The American Paper Institute (Institute) notes that the instructions to the Commission from Congress direct the Commission to establish standards and procedures for determining whether and when a carrier possesses market dominance over a service. The Institute points out that the Commission, in its Notice, has endeavored to follow this instruction, while DOT, the railroads, and Justice have, on the other hand, put forward procedures which have as their starting point the presumption that a carrier does not have market dominance unless lack of effective competition is proved. The Southwestern Utilities Group[8] argues that the Commission should not accept the position that competition is the norm. Commonwealth Edison Company, Detroit Edison Company, and Wisconsin Power & Light Company state that the railroads' position misconceives the issue before the Commission. They argue that the issue is not whether the railroads encounter substantial competition on, for example, 90 percent of their traffic, but rather is the identification of traffic for which there is effective competition, whatever percentage it may be of the total

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[8] Central Louisiana Electric Company, Central Power and Light Company, Gulf States Utilities Company, Houston Lighting & Power Company, and System Fuels, Inc.

rail traffic. The Drug and Toilet Preparation Traffic Conference, Farm and Industrial Equipment Institute, and National Small Shipments Traffic Conference, Inc., also point out that the contention made by the railroads, DOT, and Justice that the railroads have market dominance over only a small percentage of freight traffic is irrelevant since specific determinations must be made in each case. National Steel Corporation (corporation) notes, in this regard, that the fact that the railroads handle a small percentage of all intercity freight has nothing to do with the issues in this proceeding. The corporation states that there is a division of intermodal markets rather than effective competition throughout the entire range of transportation services. Sunkist Growers, Inc., states that each transportation mode occupies a dominant position with regard to a definite segment of the total distribution figure, at least with regard to fresh citrus fruit. The American Electric Power System argues that the great majority of rail traffic is traffic for which no other mode is reasonably available.

Several parties make the point that the emphasis on rate flexibility in this proceeding may be misplaced. The American Electric Power System argues that by stressing the freedom to raise rates, the railroads, DOT, Justice, and others have in effect created a strawman, since greater rail participation in the overall transportation picture will require rate reductions, rather than rate increases. Amax, Inc., also makes the point that where competition exists for a given movement, the railroad would not be likely to increase its rate, since to do so would result in a loss of business.

DISCUSSION AND CONCLUSIONS

One of the stated intents of Congress in the 4R Act is to permit railroads greater freedom to raise or lower rates for rail services in competitive markets. With regard to the freedom to raise rates, Congress has adopted a market dominance test, and has directed this Commission to develop guidelines for making determinations in specific cases as to whether there is effective competition in the relevant market.

The legislative history of the market dominance provision offers no detailed guidance for the Commission in adopting implementing rules. Nevertheless, some basic propositions do emerge. First, it is clear that Congress expected that the market dominance concept would result in some lessening of maximum rate regulation, but that this lessening is only to take place where competition is actually sufficient to insure that rates will not exceed a reasonable level. Congress intended that the railroads' need for rate flexibility be balanced against the public's need for protection against excessive rates. Second, the Commission is to have broad discretion to devise rules to implement the market dominance concept, and such rules, designed only to provide a threshold test, are to be practical and subject to prompt administrative application.

We have endeavored to focus the fact finding process through the use of rebuttable presumptions. Although the legislative history indicates that the Commission is not to be strictly bound by antitrust concepts and precedent, such precedent does provide analytic tools. The standards embodied in the presumptions, therefore, reflect such traditional antitrust concepts as market share, concerted action, pricing practices, and barriers to entry. The presumptions are designed to cover a limited number of situations in which experience has shown that railroads typically possess market dominance, and we believe that their operation, consistent with congressional intent, will not impose restraints on the freedom to raise rates other than in situations where there is an absence of effective competition. We disagree with the argument made by the FTC that presumptions should not be used. First, we believe that the use of presumptions is consistent with the congressional directive that the Commission's standards and procedures be designed to provide for practical determinations without administrative delay. Second, the FTC's concern that the presumptions cannot be rebutted is completely unfounded, since we expressly provide for their rebuttal through the submission of relevant evidence. Third, the presumptions encompass precisely the market criteria of structure, conduct, and performance that the FTC argues must be recognized in the evaluative process.

Since the use of rebuttable presumptions is the best means of readily identifying those situations were market dominance exists, we have set forth the following four presumptions. Where the rate in issue has been discussed, considered, or approved under a carrier ratemaking agreement approved by the Commission, pursuant to section 5a or 5b of the act, it will be presumed that any carrier participating in the involved rate or in such discussion, consideration, or approval does not provide effective competition for the involved traffic. Market dominance will be presumed in the following situations: (1) where the market share of the proponent carrier is 70 percent or more; (2) where the rate in issue exceeds the variable cost of providing the service by 80 percent or more; and (3) where the shipper has made a substantial investment in rail-related equipment. As will be explained more fully below, we will also consider other relevant evidence not related to the presumptions.

When the operation of a presumption has been triggered by the evidence submitted in a case, the rail carrier has the burden of coming forward with evidence to rebut the presumption. Once established, a presumption stands until rebutted by a preponderence of evidence to the contrary. Rebuttal may consist either of evidence contradicting the existence of facts upon which the presumption is grounded or upon other evidence establishing the existence of effective competition.

It should be noted that the presumptions do not shift the burden of proof in a proceeding. In all instances where a rail carrier elects to proceed under section 15(8)(c), a protestant must show that the carrier has market dominance before the rate will be suspended. If section 15(8)(c) is not invoked, protestant nevertheless must meet its statutory burden at the suspension level.[9] In an investigation proceeding following suspension of an increased rate, the proponent carrier must prove that market dominance is not present. Where an initial rate is challenged, the protestant must demonstrate that market dominance exists. Likewise, in a complaint proceeding under section 13 of the act, the burden of proving market dominance will be on the complainant. It should also be noted that the converse of a particular presumption is not implied; for example, possession of a market share of less than 70 percent does not necessarily establish effective competition.

Finally, issues raised by the participants but not specifically discussed herein have been considered but discussion and resolution thereof has been found unnecessary.

The Presumptions

Four presumptions have been developed to facilitate market dominance determinations. Each presumption will be stated first, followed by a discussion of representations relating to that presumption. In our concluding statement with regard to each presumption we have endeavored to indicate how it would be applied, and what evidence would be particularly relevant in rebuttal.

(1) In any proceeding involving a determination as to market dominance wherein the evidence adduced establishes that the rate in issue has been discussed, considered,

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[9] See section 15(8)(d), set forth in appendix F, p. 3.

or approved under a rate bureau agreement filed with the Commission, pursuant to section 5a or 5b of the Interstate Commerce Act, a rebuttable presumption will arise that a carrier participating in the rate or, in such discussion, or consideration, does not provide effective competition to the proponent rail carrier for the involved traffic or movement.

Representations.—As originally proposed, a rebuttable presumption of market dominance would have arisen where the rate in issue had been discussed or considered before a rail carrier rate bureau. Some parties, including Sunkist Growers, Inc., Pennsylvania Power and Light Company, National Cotton Council, Chicago Board of Trade, Drug and Toilet Preparation Traffic Conference, et al., and Commonwealth Edison, et al., urge that this presumption be made conclusive. Allied Chemical Company advocates that the presumption be made conclusive only with respect to intramodal railroad competition. Other parties, such as Justice, FTC, DOT, USRA, E. I. Dupont de Nemours, Inc., and Georgia-Alabama Textile Traffic Association, Inc., et al., support the railroads' contention that evidence of rate bureau discussions has no bearing on sources of intermodal competition which do not participate in the rate bureau proceeding.

Several parties[10] believe that mere discussion or consideration of a rate is insufficient to warrant a presumption. They stress that not all such actions are collusive in nature. On the other hand, General American Transportation Corporation urges the presumption also apply to discussion or considerations within rate bureau committees such as the Uniform Classification Committee, National Diversion and Reconsignment Committee, National Perishable Freight Committee, and the AAR Committee on Compensation. The Society of the Plastics Industry, Inc., inquires whether the presumption will affect rate considerations by various rate bureau research groups. Some parties contend that a rate published under right of independent action should give rise to a presumption of market dominance, while others argue that this situation calls for a presumption of effective competition. American Textile Manufacturers Institute, Inc., et al., express concern that any rate bureau presumption should encompass situations where an interterritorial increase is preceded by discussions[11] between carriers in different rate bureaus.

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[10] E. I. Dupont de Nemours, Inc., Stupp Corp., General Refractories Co.

[11] Unless otherwise indicated reference to discussions also includes reference to considerations and approvals.

Some shippers fear that a presumption of market dominance where a carrier engages in rate bureau activity would encourage carriers to abuse rate bureau procedures or result in increased independent publication of railroad rates, to the detriment of shippers. Geo. A. Hormel and Co., et al., note that rate bureaus provide shippers with the opportunity to learn, before the fact, of tariff changes affecting them or their competitors, and minimize the number of contested publications before the Commission by permitting shippers to express views on proposed rate changes through an appeals process within the rate bureau. Consolidated Papers, Inc., et al., are similarly concerned that shippers would not receive full public notice prior to the publication of single-line rates.

Several other reasons are given for limiting the effect of any rate bureau presumption. The railroads and Justice imply that discussions and considerations between interlining railroads should not give rise to a presumption of market dominance. The railroads argue that much discussion is solely for the purpose of avoiding violations of sections 3 and 4 of the Interstate Commerce Act. Justice recommends that rate bureau action give rise to a presumption of market dominance where the participating carriers carry more than 70 percent of the tonnage of the involved traffic.

Conclusions.—We believe that a limited presumption, that carriers who have jointly discussed the rate in issue do not compete effectively, is an appropriate tool which will aid the Commission's factfinding process. Accordingly, the originally proposed presumption has been modified to provide that a carrier which participates in such rate or in discussion, consideration, or approval of the rate in issue pursuant to a rate carrier ratemaking agreement approved by the Commission does not provide effective competition for the involved traffic or movement. Since the possibility of effective competition from other nonparticipating carriers or modes has been left open, this presumption complies with congressional intent as expressed in the Conference Report:[12]

> Inasmuch as the new section 5b permits the consideration of rates free from the antitrust restrictions which would otherwise control competitive markets, the Committee of Conference intends that there will be presumed to be an absence of effective competition between railroads with respect to any rate discussed or considered under an agreement approved by the Commission pursuant to the new section 5b of the Interstate Commerce Act.

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[12] H.R. Rep. No. 781 94th Cong., 2d Sess. 148 (1976).

Congress clearly intended that any activity which the antitrust laws would prohibit but for the ameliorating effect of section 5b of the act should give rise to a presumption against effective competition. That section relieves participating carriers from the operation of the antitrust laws "with respect to the making of such agreement, and with respect to the carrying out of such agreement in conformity with its provisions and in conformity with the terms and conditions prescribed by the Commission." While joint consideration of rates is ordinarily considered to be illegal price fixing in unregulated industries, Congress has continued to recognize that the power of this Commission to prescribe and enforce appropriate conditions on such activity operates to protect the public from unreasonably high rates. Clearly, where the antitrust laws do not apply, regulatory protection must continue to safeguard the public interest.

The presumption is intended to apply to any formal or informal action involving the proponent carrier which takes place within the rate bureau structure so as to render the participating carriers immune from the antitrust laws. It encompasses all instances where informal or tacit pricing approval has been reached through the rate bureau process. The presumption will reach situations where actual rate bureau approval never takes place, but rate bureau procedures are used as a forum to sound out competitors on a rate proposal and any publication of that rate later occurs.

The presumption will encompass any activity of a committee, subcommittee, or research group within the rate bureau. Application of the presumption to such committees is complicated by the fact that some are staffed by bureau employees while others are composed of carrier members. Where a rate proposal receives no discussion or consideration other than by a committee or research group, and the proponent carrier is not directly represented on the committee or group, the Commission will consider whether all the facts indicate that the actions of the committee or group members should be attributed to the proponent carrier. The essential question in such an inquiry will be whether there is an actual principal-agent relationship between the proponent carrier and the committee or group members.

Discussions between members of different rate bureaus concerning interterritorial rates clearly fall within the purview of this presumption.[13] The fact that interterritorial rates are discussed or considered by more than one rate bureau does not provide a persuasive basis for modifying the application of the presumption.

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[13] Discussions of interterritorial rates will often involve carriers from more than one territorial rate bureau. See *Railroad Interterritorial Agreement*, 287 I.C.C. 701 (1953).

Ordinarily, no presumption will attach when a proposal is docketed for independent action pursuant to rate bureau procedures. We do note, however, that the presumption will apply when two or more carriers which have previously discussed or considered a conference rate later publish the same or similar rates, at or about the same time, pursuant to their right of independent action. The circumstances underlying independent action are too varied to permit any uniform inference, and the circumstances surrounding such publication will be considered on a case-by-case basis.

Contrary to the allegations of several parties, we are not persuaded that the presumption will significantly encourage misuse of the rate bureau process. Active Commission surveillance and enforcement together with the antitrust laws should deter potential abuses.

We do not believe that our presumption will discourage utilization of the rate bureau process. Much shipper criticism on this point has been mooted by section 208(b) of the 4R Act which prohibits railroad rate bureaus from voting on or permitting participation in agreements with respect to single-line rates, allowances, or charges. With respect to other rates, candid carrier disclosure during public rate bureau meetings informing concerned shippers of the reasons for proposing rate charges frequently eliminates controversy.

Justice's recommendation that no rate bureau presumption be operative unless the participating carriers collectively transport more than 70 percent of the involved traffic places undue emphasis on market share. While market share is an important indicator of the presence or absence of effective competition, it is not an exclusive measure. Tonnage information may be difficult to obtain in many cases. We believe that Justice's objection that the originally proposed presumption did not indicate whether the participating carriers had sufficient power to dominate the market has been obviated by limiting the effect of the presumption to the participating carriers.[14] Limitation of the rate bureau presumption in the manner proposed by Justice would appear to conflict with the congressional intent discussed above.

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[14] We note that our market share presumption, treated elsewhere in this report, considers the share of the market presently held by such participating carriers as part of the proponent railroad's share.

Rebuttal of this presumption is, like all the presumptions set forth in this report, not limited to negation of the basic facts on which the presumption is predicated. Any competent evidence may be presented to show that a noncompetitive inference is not justified.

Contentions that the Commission should consider the motive underlying the particular rate bureau action are without merit. Unlike the antitrust laws, market dominance does not rest on any particular intent or state of mind. It is the objectively manifested effect of a particular action which will concern the Commission. For example, claims that a particular rate bureau action was solely for the purpose of avoiding violations of sections 3 and 4 of the act will not be persuasive unless it can be shown that the action was actually limited to that purpose.

The proponent carrier may always prove that the rate bureau action could not reasonably have had an anticompetitive effect. For example, it might be shown that meaningful shipper participation in the rate bureau action eliminated the possibility of noncompetitive collusion. Similarly, proof that committee or research group work was so narrow in scope that the action would not be prohibited by the antitrust laws may be offered. In considering such rebuttal evidence, the Commission will remain mindful that these situations are exceptions to the general intent expressed by Congress.

(2) A rebuttable presumption of market dominance will arise where the proponent carrier has handled 70 percent or more of the involved traffic or movement during the preceding year; the market share of the proponent will be deemed to include the share of any affiliates, and of any carriers with whom the proponent carrier has discussed, considered or approved the rate in issue.

a. *Representations: The 70-percent test.*—Because market share is generally considered to be a reliable indicator of market power, we originally proposed a presumption of market dominance where no carrier has handled a significant amount of the traffic. This was an effort to allow consideration of all relevant transportation circumstances. Nevertheless, many of the parties contend that the standard originally proposed is too vague and that the Commission has given little or no direction as to how it will be applied. DOT, Justice, Agriculture, USRA, and the railroads have strongly advocated that the Commission adopt a specific percentage guideline.

Justice states that market share is "the starting point for a traditional antitrust inquiry into suspect monopolization." It maintains that relevant antitrust case law indicates that firms with less than 70 percent of the market do not have monopoly power. In support of this proposition Justice cites ***American Tobacco* v. *United States,*** [15] and ***United States* v. *United Shoe Machinery.***[16] Justice proposes that a rail carrier should be deemed *not to have market dominance* "where the carrier filing the rate handled less than 70 percent of the involved traffic for two years preceding the filing of the rate."

Also in support of a specific percentage market share test, DOT states that market share has traditionally been the most accurate way to ascertain relative competitive position in any market. It argues that the Senate Report's reference to concentrated markets suggests that such a test would be appropriate here. DOT advocates a presumption that effective competition exists where the share of the relevant market possessed by competitors of the proponent railroad is 30 percent or greater. Where the market is shared by at least three other carriers each of which handles more than a de minimus amount of traffic, DOT believes that shippers have an effective alternative source of transportation. It explains that the three-carrier requirement is designed to assure that the market is shared by a sufficient number of firms to preclude such oligopoly problems as collusion and price leadership. DOT states generally that the 30-percent figure is within the wide range allowed in most major antitrust cases, while admitting that this precedent is "by no means clear or exact."

Agriculture agrees that market share is an important factor in determining whether a railroad dominates a particular market. It states that for most commodities a 30-percent share of the traffic moving by other carriers between origin destination pairs should be considered a significant amount. However, Agriculture stresses that this number should be used only as a guideline and that shippers or carriers should have the opportunity to present evidence of effective competition or of market dominance.

The railroads propose that effective competition be presumed where less than 80 percent in tons of the movement to which the rate applies was transported by rail during either of the 2 preceding years. In support of their position that an 80-percent test should be adopted, the railroads cite ***United States* v. *Aluminum Co. of American,***[17] ***United States* v. *Grinnell Corp.,***[18] ***American Tobacco, supra, United Shoe Machinery, supra, Kansas City Star Co.* v. *United***

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[15] 328 U.S. 781, 795 (1946).

[16] 110 F. Supp. 295 (D. Mass. 1953), affirmed *per curiam* 347 U.S. 521 (1954).

[17] 148 F. 2d 416, 429 (2d Cir. 1945).

[18] 384 U.S. 563, 571 (1966).

States,[19] and *International Boxing Club, Inc.* v. *United States.*[20] They argue that none of the Government agencies cite adequate precedent to support their proposed 70-percent standard and that the cases cited by Justice actually support an 80-percent test. The railroads further contend that none of these cases intimate that a share as low as 70 percent can properly be regarded as indicative of monopoly.

USRA also endorses a market share test with certain qualifications. It proposes adding the shares of rail carriers who have discussed the rate under a rate bureau agreement to the shares of the proponent carrier for the purposes of the test.

NERA, on behalf of various utility companies, maintains that antitrust rulings do not require that a firm control a market share of 80 percent before a finding of an absence of effective competition can be made. Although NERA urges that decisive importance not be given to a particular numerical percentage, it states that if a precise figure is required, market dominance should be presumed where a carrier has at least 45 percent of the traffic with no other carrier accounting for more than 20 percent, or where a carrier has at least 70 percent of the traffic, regardless of the distribution of the remainder. It contends that a consensus has emerged with respect to the use of a four-firm concentration ratio of 40 to 50 precent as an indicator of market power, but stresses that attention must be focused upon the number and relative size of firms sharing the market as well as absolute share. NERA asserts that the selection of a threshold share of 70 percent is generally consistent with the test set forth in *Alcoa, supra.*

Although none of the other shipper interests discussed the share of the market test extensively, Allied Chemical gives general support to a 70-percent test. In contrast the Montana Public Service Commission and the State of Pennsylvania believe that the 70-percent requirement is too high, and several parties advocate a 50-percent test.[21]

A number of shippers object to the heavy reliance which the railroads and several Government agencies have placed upon the market share test in this proceeding. International Minerals and Chemicals points out that a market share test will not always yield accurate results in oligopolistic markets because carriers may well believe that their best interest lies not in competing for traffic but in retaining their existing share of the market and taking all the general increases. Therefore, shippers contend, the fact that a competing mode may have 30 percent of a market does not mean that the involved rate is set by effective price competition.

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[19] 240 F. 2d 643 (8th Cir. 1957).

[20] 358 U.S. 242 (1959).

[21] Institute of Scrap Iron and Steel; Manufacturing Chemists Association, Dow Chemical Co., National Cotton Council and L. T. Barringer, Drug and Toilet Preparation Traffic Conference et al.

b. *Brief summary of judicial precedents.*—As we indicated in our Notice of Proposed Rulemaking, the legislative history of section 202 demonstrates that the Commission is not to be strictly bound by antitrust concepts and precedents. In developing standards for making market dominance determinations we must keep in mind that we are dealing only with a threshold test to identify appropriate areas for rate regulation. Problems faced by the courts in enforcing the Sherman and Clayton Acts are not strictly analogous.

Because there is a common factual nexus between cases under the antitrust laws and cases where a market dominance finding is required, and because the parties have advanced conflicting interpretations of the court decisions, a review of the relevant precedents is appropriate here. The Commission must be able to assess the degree of competition which exists in a particular market. Most of the judicial precedent cited by the parties has arisen under sections 1 and 2 of the Sherman Act,[22] under which courts must determine whether the defendant firm has monopolized or conspired to monopolize a part of trade or commerce. These findings are often predicated, at least in part, on a market share test.

In the *Alcoa* case, a landmark decision in antitrust law, the court determined that by controlling over 90 percent of the market in virgin aluminum ingot, *Alcoa* had monopolized that industry. The rationale of Judge Learned Hand for using market share as a test for monopolization bears repeating here:

> The producer of so large a proportion of the supply has complete control, within certain limits. It is true that, if by raising the price he reduces the amount which can

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[22] Relevant portions of the Sherman Act are as follows:

> section 1. Every contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States or with foreign nations, is hereby declared to be illegal***.
> section 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

> be marketed—as always, or almost always happens—he may invite the expansion of the small producers who will try to fill the place left open; nevertheless, not only is there an inevitable lag in this, but the large producer is in a strong position to check such competition***.[23]

The court also indicated that it would be a close question whether 60 or 64 percent would be enough; but that 33 percent would not be enought to constitute monopolization.[24] ***American Tobacco, supra,*** involved a charge of conspiracy to monopolize against three major tobacco companies, under section 2 of the Sherman Act. The three companies were said to have "marked dominance" in their control of 68 percent of the domestic cigarette production, and 80 percent in the special field of burley-blend cigarettes. Noting that the smallest of the three firms had more than twice the production of the next largest competitor, the court held that "comparative size on this great scale inevitably increased the power of these three to dominate all phases of their industry." In ***United Shoe Machinery, supra,*** the court found that by supplying between 75 percent and 95 percent of the total current demand for shoe machinery (approximately 85 percent) United was chargeable with having monopolized the market. The Supreme Court said in ***United States*** v. ***E. I. Du Pont de Nemours & Co.***, 351 U.S. 377, that if cellophane were a meaningful market, Du Pont's 75-percent share would be enought to indicate monopoly power. However, it concluded that in the relevant market, flexible wrapping materials, Alcoa controlled only 17.9 percent of the market, which did not constitute monopolization.

Monopolization was also found under section 2 of the Sherman Act in ***International Boxing Club, supra,*** where defendants staged or controlled 81 percent of championship boxing matches and in ***Kansas City Star, supra,*** where defendant controlled over 85 percent of the market for newspaper advertising. In ***Grinnell, supra,*** the Supreme Court explained that monopoly power, the power to control prices or exclude competitors, can be inferred from the predominant share of the market. The Court found that the combined share of 87 percent held by a group of closely affiliated companies was a clear indication of market power. The Court also found that the market share (73 percent) of one of the affiliated companies was so large as to require divestiture.

It is important to view these applications of the market share test in proper perspective. As the United States District Court noted in ***United Shoe, supra,*** at 342, "It is delusive to treat opinions written by different judges at different times as pieces of a jigsaw puzzle which can be, by effort, fitted correctly into a single pattern." We also observe that the courts in these cases have been reluctant to set a lower limit of a market share which would constitute monopolization, and have limited their consideration to the particular situation they are facing. Keeping these precautions in mind, we can conclude that as a general rule courts have found that a firm controlling over 70 percent of the relevant market has monopolized that market.

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[23] *Alcoa, supra,* at 425.

[24] *Id.* at 425.

Market share tests have also been used in assessing the probable anticompetitive effects of consolidations and mergers under section 7 of the Clayton Act.[25] The Supreme Court has said that "The market share which companies may control by merging is one of the most important factors to be considered when determining the probable effects of the combination on effective competition." *Brown Shoe Co.* v. *United States.*[26] In that case, where the combined market share of the merging firms in seven cities ranged between 33 and 57 percent, the merger was found to have a probable anticompetitive effect.

In *United States* v. *Philadelphia National Bank,*[27] where merger of two banks would have allowed control of 30 percent of the commercial banking business in the Philadelphia area, the court said, "Without attempting to specify the smallest market share which would still be considered to threaten undue concentration, we are clear that 30 percent presents that threat." Likewise, in *United States* v. *Aluminum Co. of America et al.,*[28] the court found that the merger of two firms with a combined market share of 33.8 percent would substantially lessen competition. The court explained the relationship between the degree of concentration and degree of competition as follows: "It would seem that the situation in the aluminum industry may be oligopolistic. As that condition develops, the greater is the likelihood that parallel policies of mutual advantage, not competition will emerge." The court also found a merger to have a probable anticompetitive effect in violation of section 7 in *United States* v. *Continental Can Co.,*[29] where the merging firms controlled 25 percent of the market.

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[25] Section 7 provides that "no corporation engaged in commerce shall acquire *** stock or other share capital *** where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

[26] 370 U.S. 294, 343 (1962).

[27] 374 U.S. 321 (1963).

[28] 377 U.S. 271 (1964).

[29] 378 U.S. 441 (1964).

Finally, it should be noted that this Commission is not without experience in dealing with the problems of market power and market share as Congress has delegated to us the duty of enforcing section 7 of the Clayton Act with respect to carriers subject to the Interstate Commerce Act.[30] In a recent decision, ***Navajo Freight Lines Inc.—Invest. of Control,***[31] the Commission determined that Navajo's acquisition of Garrett stock caused a violation of section 7 by substantially lessening competition and tending to create a monopoly. This determination was based in part on our finding that in relevant city-pair markets the acquisition of stock could eventually lead to control of market shares ranging from 15 to 75 percent.[32]

Because the Clayton Act is directed to the prevention of acts which tend to lessen competition, courts have acted to prevent mergers resulting in levels of concentration substantially lower than would be necessary to support a charge of monopolization under the Sherman Act. The courts have recognized the prospect of a definite lessening of competitive forces where the merging firms control between 25 and 35 percent of the relevant market.[33]

c. *Conclusions.*—We concur in the opinion expressed by Justice and DOT that market share is a reliable indicator of market power. Furthermore, we are persuaded that a market share test would be one effective tool for making market dominance determinations within the short time frames imposed by the 4R Act. Where adequate tonnage figures are available, this test could be applied without the need for lengthy evidentiary proceedings.

Markets characterized by either perfect competition or pure monopoly are rare, and our task is to determine at what point between these theorectical extremes the market is not sufficiently competitive to protect the public interest. As we have previously indicated, courts have generally found monopolization where

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[30] See *United States* v. *Navajo Freight Lines Inc.*, 339 F. Supp. 554, 561 (D. Colo. 1971), *appeal dismissed* 405 U.S. 1035 (1972).

[31] 122 M.C.C. 345 (1976).

[32]

	Percent
Denver, Colo. to Las Vegas, Nev	75.5
San Francisco, Calif., to Denver	38.9
San Francisco, to Las Vegas	15.7
Los Angeles, Calif., to Denver	19.7

[33] We also note that in In Exxon Corp., et al., Federal Trade Commission Docket No. 8934, the FTC has attacked an alleged oligopoly shared by the eight largest domestic oil companies on the basis that these companies which share approximately 65 percent of the market have maintained a noncompetitive market structure in violation of section 5 of the Federal Trade Commission Act, 15 U.S.C. 45.

market shares exceed 70 percent, and have found a lessening of competition where market shares exceed 25 percent.

Market dominance occurs where a rail carrier has such a degree of market power that competition is not an effective force in the regulation of rates. We believe that for the purposes of determining market dominance of transportation services, it is appropriate to presume that a carrier who controls 70 percent or more of the market has market dominance. This presumption reflects our judgment that in most cases a rail carrier having such a share would have the power to control prices. If competitors serve less than 30 percent of the market they are usually not in a position to absorb rapidly a substantial amount of traffic diverted by higher rail rates. Shippers will continue to rely on the services of the dominant rail carrier, at least in the short run, despite increases in the rate charged. On the other hand, if competitors are already handling 30 percent or more of the traffic, the competitive service is very likely to be a commercially feasible alternative.

The 70-percent presumption is primarily directed towards the identification of monopoly situations and is not intended to reach oligopoly situations, even though oligopolies clearly fall within the scope of the Commission's regulation under the market dominance definition. It cannot be expected that the percentage of the market held by a single firm will reflect oligopolistic control of the market. At this time we believe that proposals to consider the relative market share of all the firms sharing the market, while having some merit, are too complex to be implemented in a specific presumption. Nevertheless, we leave open the possibility that a further refinement of market share analysis could lead to a presumption suitable for identifying oligopoly situations. Situations where a small number of firms control the relevant market can often result in actual or tacit price collusion, and these markets will be carefully considered.

We are aware that market share cannot automatically be translated into market power or the absence thereof. A shipper who is unable to demonstrate that the carrier controls over 70 percent of the traffic can prove market dominance by establishing one of the other presumptions or by presenting any other relevant evidence to show that there is an absence of effective competition. For example, a shipper could show that the rate in issue generates revenue which exceeds variable cost by 80 percent, or that carriers collusively share the market or follow parallel pricing policies to assure joint maximization of profits. Conversely, a rail carrier controlling over

70 percent of the market still has the opportunity to rebut the presumption by showing that effective competition exists. For example, the carrier could show that it has been engaged in vigorous price competition with other carriers which has resulted in a relatively low level of rates on the involved traffic.

In calculating the market share of the proponent carrier, the market shares handled by carriers who have discussed the rate with proponent under the rate bureau procedure will be included. As was discussed previously, it is appropriate to presume that where carriers have discussed, considered, or approved a rate pursuant to a rate bureau agreement, those carriers do not engage in active competition for the traffic. In like manner, we do not expect that affiliates will engage in active competition where there is a substantial overlap in ownership.

d. *Representations: Market definition.*—In general, Justice, DOT, and the railroads advocate a broad market definition including, in addition to carrier competition for the specific movement, competition of substitute products, geographic competition, and potential competition. Briefly stated, product substitution refers to the shipper's or receiver's option to use commodities which are interchangeable for the commodity named in the issue tariff; geographic competition is shipper use of alternative destinations or sources for the products to which the rate applies; and potential competition is the possibility that carriers not presently sharing the market will enter if the rail carrier raises its rates. Justice would consider movements which are competitive under any one of these theories in calculating market share, while the railroads and DOT would consider such evidence only after determining market share based on direct carrier competition.

In sharp contrast, shippers and shipper interests are almost unaminous in their support of a market definition which is confined to carrier competition for the specific movement to which the rate applies.

Justice would define the words "market" and "traffic" in the definition of market dominance in section 202 to include (1) movements of the same commodity from other sources, and (2) movements of substitute products. It argues that the rate from one source circumscribes the rate a railroad can charge for moving the same commodity to a particular destination from other sources, as the carrier will adjust its rates to allow shippers it serves to compete for the sale of their product. Justice argues that rates may be kept at competitive levels if there are close substitutes for the goods which are being transported, and shippers can receive the substitute by another carrier. Justice also contends that a railroad's statistically high percentage of the market results in some cases from entry limitations imposed by the Commission, and it urges a standard based on a demonstration that other carriers would enter the market but for the lack of certification.

DOT argues that the legislative words "market" and "traffic" require further definition and that the use of these terms must have contemplated competition other than carrier competition between the points to which the rate applies. If the consignee has the alternative of receiving the commodity it needs from another source, thereby using a different carrier, DOT would maintain that effective competition exists within the meaning of the 4R Act. However, DOT does not advocate that "geographic competition" be considered in calculating market share, but suggests that if effective competition is not demonstrated under the market share test, the railroad should then have the opportunity to prove geographic competition.

DOT maintains that rail carrier ratemaking is influenced by the prospect that an increase will cause substitution of one commodity for another or a restriction in the extent to which a commodity can compete geographically. It argues that the Commission should consider a broad range of choices available to shippers and consignees. These shipper alternatives include use of another common carrier of another mode, use of an unregulated carrier, change in inventory and shipment size policy, change in marketing policy, change in products produced, or change of location. If the shipper has one of these available, then the rail carrier is not in a position to dominate the market. DOT admits that the decision to adopt one of these latter alternatives is generally long run in nature.

DOT also stresses the importance of potential competition as a regulator of carrier behavior, and argues that a key test of market dominance should be whether, given freedom of entry, competition would develop and limit the bargaining strength of an otherwise dominant rail carrier.

The railroads maintain that in making market dominance determinations we must consider "the full range of constraints that the market imposes on a given carrier's power over the rates for specific traffic or a specific movement." While agreeing with Justice that source competition and product substitution are relevant factors to be considered in determining market dominance, they do not support the broad market share test which Justice has proposed:

"As a practical matter we have difficulty in seeing how such traffic could be routinely taken into account in ascertaining whether or not the specified percentage had moved by other modes."

The railroads contend that antitrust precedent such as the *Du Pont* case, *supra*, and the House and Senate Reports, would support the determination of effective competition in the context of a product market and a geographic market. They argue that effective competition exists within the meaning of the 4R Act where a buyer of the transported commodity can readily shift to another source of supply. These sources, they maintain, are in the relevant product market for determining whether effective competition exists. Likewise, it is argued that the relevant product market includes substitute products which could be delivered by other carriers or carriers of other modes.

Also in support of their market definition, the railroads argue that the importance of competition from substitute products and alternate geographic sources has been recognized by this Commission in numerous cases. They state that the Commission has found various mergers to be consistent with the public interest, relying at least in part on these types of competition. The railroads also contend that "The competition of other modes regulated and exempt, for-hire and private has repeatedly been held to justify rates which might otherwise have been found in violation of various provisions of the Interstate Commerce Act." For example, they note, if truck or water carriers are competing for traffic even from an area not directly served by a railroad, but with the effect of disadvantaging the railroad's position and that of its customers, the carrier can lawfully make a competitive marketing response in order to protect its competitive position and that of the shippers. The railroads also maintain that "the reasonable prospect of competition" should be considered, as where an increase rate would be likely to divert traffic to another carrier or another mode, including private carriage.

USRA would define the market to include shipments of substitute commodities moving to the same destination from sources of comparable or shorter distances. It would include private carriage in the calculation of market share.

Numerous shippers and shipper interests object that the market definition proposed by the railroads and Government agencies is overly broad, and goes beyond the statute. They argue strenuously that the intent of Congress is clear that a finding of the absence of market dominance must be predicated on the existence of carrier competition. NERA objects that the approach advocated by the railroads would require a consideration of "every conceivable factor that in any time frame, however remote, could limit in any way a railroad's ability to raise its rates without risking loss of business." Shippers are concerned that an overly broad market definition will have the practical effect of denying them a forum to redress unreasonable rate increases.

Shippers maintain that proponents of a broad market definition have urged a misreading of *Du Pont supra,* an important decision delineating "the product market" under the Sherman Act. The shippers argue that *Du Pont* does not support, even by analogy, a consideration of substitute commodities moving in commerce in making market dominance determinations. In *Du Pont* the court found that although defendant produced almost 75 percent of the cellophane sold in the United States, it produced less than 20 percent of all the flexible packaging material. The court said that control of the market depends upon the availability of alternative commodities for buyers. Shippers argue, however, that with regard to market dominance we are dealing with a market for services, and not for commodities, and that we must be concerned with alternative transportation services which can be substituted for the proponent rail service. They maintain that the Commission should consider only the commodity moving under the rate in issue, and not other commodities which may or may not be feasible substitutes from the shipper's viewpoint.

The shippers further maintain that our analysis of competition should be confined to the specific traffic or movement to which the rate applies. They argue that "so called geographic competition" or competition from traffic that could not move under the rate in issue cannot be depended on as an effective regulator of rates, since the rail carrier is under no obligation to adjust its rates to meet competition that shippers face in the distribution of their product. Du Pont contends that the proper approach would be to consider commercially feasible alternatives to cover shipment of a particular commodity from a specific shipping point to a specific destination. The Drug and Toilet Preparation Conference and New England Grain and Feed expressed very similar views.

NERA, The Upper Great Plains Traffic Institute, and Phillips Petroleum propose that the Commission consider whether the shipper has a choice of carriers to move its goods. They argue that even if there is a high degree of competition in many segments of the railroad industry, this competition is of no avail if the shipper has no realistic alternatives in a particular situation.

NERA urges that in assessing the competitive situation of the railroads, we consider the short time period during which the rate in issue will be in effect. It argues that if shipper alternatives require considerable time for their implementation, then they are not likely to be effective regulators of rail rates. NERA also suggests that movements during periods of extraordinary situations such as an act of God, a strike, or a railcar shortage, should not be considered in calculating market share.

e. *Conclusions.*—An appropriate market definition is necessarily a crucial aspect of any test for market dominance, and particularly a test based upon a share of the market theory. If shippers and carriers are to make timely evidentiary presentations, they should know what evidence is relevant in the calculation of market share, and what evidence will be considered in rebuttal of an inference of market dominance.

The focus of our analysis is section 202 of the 4R Act which defines market dominance as "an absence of effective competition from other carriers or modes of transportation for the traffic or movement to which the rate applies." With only this brief definition as a guideline, this Commission is specifically directed to establish both standards and procedures for making market dominance determinations, and to design rules to provide for "a practical determination without administrative delay." After assessing the statutory language and considering the need for quickly identifying whether effective competition is present, we have concluded that the appropriate market is the market for transportation services which directly compete with the service outlined in the tariff under consideration. Limiting consideration to direct carrier competition is consistent with the express language of the legislative definition, and is essential to making practical determinations in a short time period.

The contention of some of the parties that use of the word "traffic" in conjunction with the word "movement" requires consideration of a broad range of movements of various commodities moving from various sources to various destinations must be rejected. The 4R Act speaks of "the traffic or movement to which the rate applies." When used in this context in the transportation industry, the word "movement" refers to transportation from a single origin point to a single destination point, while the word "traffic" commonly denotes transportation services from a named set of points to another point or set of points; from specific origin points or areas to rate groups or blanket areas; or between stated mileage brackets on particular commodities in a given territory. There is no language in the legislation which would warrant the extension of the phrase "the traffic or movement to which the rate applies" beyond transportation services which are comparable to that described in the issue tariff.

Even if the market definition of the 4R Act were not so explicit, practical considerations would force us to the same conclusion. It is true that the forms of competition which the railroads, Justice, and DOT have discussed, such as product substitution and geographic competition, could have an impact upon the ability of rail carriers to raise their rates. Nevertheless, determining whether these factors have a significant impact in a particular case would require lengthy antitrust-type litigation, as the interplay which affects competition for the sale of a product and competition for transportation services is very complex. If the parties concentrate their efforts on gathering and presenting evidence of direct carrier competition, then the Commission will be able to make these threshold determinations promptly, and the expense to the parties and the public will be minimized.

The difficulty of considering movements from alternate origins or to alternate destinations stems from the fact that transportation is but one of many costs in the process of production; other costs include labor, capital, materials, other distribution costs, profit, and taxes. The railroads imply that if producers are at a disadvantage in marketing a product in a particular area, rail carriers will automatically reduce their rates to allow the shipper to compete. Although the shipper in this situation will bargain with the carrier and attempt to obtain reduced rates, it may be forced to reduce one of the other costs of production or its profit margin. Whether or not the shipper is in a position to bargain effectively will depend upon a number of factors including the value of the shipper's traffic to the carrier, and the elasticity of demand for the shipper's product.

Cases cited by the railroads and DOT under section 3(1) of the Interstate Commerce Act represent situations where the railroads have responded to competitive pressures and reduced their rates. In these cases, the Commission has held that competition can justify unequal rate treatment which would otherwise be unlawful preference and prejudice. However, the railroad may be able to force the shipper to absorb the differential by reducing its costs or its profit margin, or may be able to produce more revenue by maintaining its higher level of rates on a diminished amount of traffic. Obviously it will not be possible to explore all of these possibilities in the context of making a threshold market dominance determination.

Proponents of a broad market definition also argue that evidence of geographic competition has been used to support findings that the anticompetitive effects of mergers and consolidations are outweighed by the economic efficiencies to be gained. This Commission has recognized in cases under section 5(1) of the Interstate Commerce Act that competition from carriers serving other sources and other destinations will, over a long enough period of time, tend to mitigate a rail carrier's market power. But this prospect does not amount to the "effective competition" which is required by the 4R Act. For there to be effective competition such as would make rate regulation unnecessary, there would have to be the likelihood of a substantial diversion of traffic within the time period during which the rate in issue is in effect, and often a shift in supply and distribution patterns is a costly and time-consuming process.

Several of the parties have argued that the *Du Pont* case would support by analogy the substitute commodity theory of effective competition. They would find competition where a shipper or consignee can meet its requirements by shipping or receiving a substitute commodity which is moved by another carrier. The *Du Pont* case is not strictly analogous, as it involves an alleged monopoly in the sale of a product, while here we are concerned with market dominance in the sale of a service. Just as the Court's focus was broadened from cellophane to flexible wrapping materials in *Du Pont*, our focus must include not only rail transportation, but the totality of available transportation services. Thus we are already faced with the complex question, parallel to that addressed in *Du Pont*, of whether the transportation services offered by various modes of transport are interchangeable. But to extend this analysis one step further and explore the question of whether a particular commodity is reasonably interchangeable from the shipper's standpoint would require extensive factfinding. If the substitute commodity is slightly different in terms of price or quality it may not be interchangeable, or the shipper may be forced to absorb the rate increase to the extent of the price differential before switching to the alternative commodity. Surely Congress did not intend to burden this Commission or the parties with such complex issues in making these threshold determinations.

The approach we took in *Navajo* to define the appropriate product market for the purposes of section 7 of the Clayton Act would also be appropriate here. In that case, after a careful analysis of relevant transportation circumstances, we determined that a particular class of carriers provides a unique transportation service which no other carriers, regardless of mode, can provide. Accordingly, the relevant product market was identified as "transportation by regular route motor common carrier of general commodities, with the usual exceptions, in LTL quantities, weighing 10,000 pounds or less."

Similarly, the relevant market for the purposes of the market share test is the range of transportation services available for moving a particular commodity from a particular shipper or shippers located at or near the origin area named in the tariff to a consignee or consignees at or near the named destination area. As the statute directs us to take into consideration the services offered by other carriers and other modes, these services will be considered in the calculation of market share if they are interchangeable.

As we assess the relevant product market for purposes of the 70-percent test it is essential to determine in a timely manner whether the services of other carriers are in fact reasonable substitutes and for this purpose shippers and carriers will be required to supply evidence of circumstances which may affect shipper ability to take advantage of services of other rail carriers or carriers of other modes.

As we have indicated, a number of parties believe that we should give consideration to potential competition in the application of our market share test. To some extent, our requirement that competing carriers must handle at least 30 percent of the traffic accounts for potential competition. Where existing for-hire carriers already handle 30 percent of the traffic, we assume that they would ordinarily be in a position to handle more should the traffic be diverted by higher rail rates. On the other hand, the prospect of competition from carriers not already in the market is necessarily more speculative. It will often be difficult to determine at what level of rates additional competitors would enter the market, and how much time it would take for these carriers to increase their capacity to handle the traffic. Also if no carriers of a particular mode are currently serving a particular market, then there is a question as to whether transporting the involved commodity by this mode would be economically feasible.

We do not wish to preclude carriers from presenting evidence of potential competition to rebut the presumption of market dominance under the market share test. However, general allegations of potential competition can be given little weight. The railroads must affirmatively show that there is a probability that additional carriers will enter the market as a result of the proposed rate increase. They will be required to establish the existence of carriers on the edge of the market who have the necessary authority, where relevant, and equipment to serve the shippers in question. Where possible, the rail carrier should present evidence of the current rates charged by these potential competitors. In addition, evidence of whether or not diversion resulted in the past as a result of similar rate increases would be highly relevant.

The proposal that we consider competition from carriers who would enter the market but for regulation is totally without merit. This Commission is required by the Interstate Commerce Act to certify motor carriers according to a standard of public convenience and necessity. If a carrier does not have operating authority, then by definition it cannot enter the market, and cannot provide effective competition. The proposal seems to imply that the certification process is designed to protect rail carriers from motor competition. To the contrary, a shipper is entitled to the advantages inherent in a particular mode of service, and motor carriers are not excluded from the market to protect the interests of rail carriers.

The existence of private carriage in a market cannot be given the same consideration as traffic moving for-hire, as private carriage does not have the same competitive impact. The private carriage of one company cannot be said to compete for the traffic or movements of another. Such private carriage is not an alternative service which vies for the traffic of other firms. Furthermore, it is difficult to conceptualize how a firm's private carriage could actively compete for its own traffic, as ordinarily private carriage is used only when common carriers are unable to provide the particular service that the shipper needs. Private carriage is only profitable to the firm in those limited situations where the company is large and diverse enough to decrease its empty-return ratio by arranging backhauls. The cost of private carriage may be said to set a ceiling above which rail carriers cannot raise their rates without fear of losing the traffic. The problem is that there is no assurance that this ceiling will be low enough to assure just and reasonable rates. Especially where private carriage is inefficient, or where the inherent advantages of rail transport over motor transport are great, private carriage could not be considered as effective competition within the meaning of the 4R Act.

Traffic moving by exempt carriage will be considered in calculating market share where adequate tonnage figures are available. However, there may be problems in this area because usually neither the shipper protestant nor the railroad know to what extent other shippers taking the rate use exempt carriers. If shippers and carriers have difficulty in presenting market share evidence where exempt commodities are involved, it may be necessary in the future to devise presumptions and procedures applicable to this area.

(3) A rebuttable presumption of market dominance will arise where the rate in issue exceeds the variable cost of providing the service by 80 percent or more.

As originally proposed, the presumption dealing with cost established a rebuttable presumption of market dominance when the rate in issue exceeds the fully allocated cost of providing the service by 50 percent or more. The response to this presumption ranged, on the one hand, from the position that it should be discarded, to the suggestion, on the other hand, that the percentage above fully allocated cost should be lower.

Representations.—The railroads seek to have the presumption discarded on several grounds. In the first place, they argue that it has no bearing on the presence or absence of competition, since some rates reached by the presumption apply to competitive traffic. Secondly, they contend that the presumption is unworkable since existing cost-finding procedures are inadequate. Finally, the railroads argue that the presumption will limit a carrier's freedom to adjust its rates upward. The railroads take the position that any rate adjustment which offers hope of contributing to the revitalization of the railroads should be viewed as fully in keeping with the purposes of the 4R Act.

DOT also takes the position that the presumption would not provide a reliable indication of the absence or presence of effective competition, since most of the traffic transported at 150 percent or more of fully allocated cost encounters extensive intermodal competition. In addition, DOT argues that the presumption should not be used since present methods of calculating railroad costs are not adequate. Justice also argues that the presumption should not be adopted until the Commission has revised its uniform cost and revenue accounting procedures.

The Council argues that a rate which exceeds average and marginal costs (including a normal profit) results in a misallocation of resources. The result is a societal loss in terms of higher transport costs and unnecessarily high prices for consumers. An excess price cost margin, according to the Council, is relevant to the issue of market dominance.

Shippers view the cost presumption as an accurate way to detect market dominance, but they make several suggestions for changes in the presumption. A great number of parties take the position that variable cost, rather than fully allocated cost, should form the basis of the presumption.[34] They contend that variable costs are the only costs which can be measured and assigned in relation to specific movements. The utilities argue that the use of fully allocated costs as the base would be particularly unfair to coal, if constant costs were allocated on a ton and ton-mile basis. Rates or volume movements of coal returning less than 150 percent of fully allocated costs could still be so high as to establish the ability to impose monopoly prices.

Many parties suggest that lower percentages above fully allocated cost should be used. Suggested percentages range from 10 percent,[35] to 25 percent,[36] to 35 percent.[37] Finally, one shipper suggests that the proposed rule be amended to provide that the fully allocated costs of providing the total service be the measure.[38]

Conclusions.—Maximum rate regulation was initially institued to guard against excessive rail profits. Such regulation can still provide protection against excessive rates on specific traffic not subject to competition. For this reason we must reject the railroads' position that any rate adjustment which would contribute to their revitalization is fully in keeping with the purposes of the 4R Act. This position is indicative of a one-dimensional view of the 4R Act, which contemplates revitalization of the railroads, not in a vacuum, but with due regard for consumer protection.[39] Thus, destructive, predatory, or unfair competitive practices not in the public interest, are prohibited.[40] Formerly, when railroads held a monopolistic position in transportation, the margin above variable cost was relatively high on many commodities, based on ability to pay or value of service.[41] Of course, the railroads no longer hold the monopoly position they once did, and today they are but one of the several important and established forms of transportation, as noted by this Commission in numerous proceedings.[42] Nevertheless, there exist some situations in which a carrier, or a group of carriers acting in concert, has a monopoly position, and one indication of such a position is a wide margin between variable cost and the rate charged. Lack of effective competition and the resulting low elasticity of demand for rail transport usually permit relatively high rates and the cost presumption is grounded upon this causal relationship. It must be remembered, however, that the presumption has no bearing on the justness or reasonableness of a particular rate. It is simply a tool to be used in making market dominance determinations.

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[34] Parties taking this position include Commonwealth Edison Company, et al.; FS Services, Inc., and International Minerals & Chemical Corporation; American Bakers Association; American Paper Institute; Consumers Power Company; Potomac Electric Power Company; Drug and Toilet Preparation Traffic Conference, et al.; Pennsylvania Power and Light Company; Carolina Power and Light Company; and FMC Corporation.

[35] Aluminum Association, Inc., and Department of Agriculture, State of Montana.

[36] American Textile Manufacturers Institute, Inc.; National Council of Farmer Cooperatives; Georgia-Alabama Textile Traffic Association, et al.; North Dakota Public Service Commission; The Society of the Plastics Industries, Inc.; Alabama Power Company, et al.; Certain-Teed Products Corporation; The Cooper Development Association, Inc.; Boise Cascade Corporation; and Upper Great Plains Transportation Institute.

[37] The Dow Chemical Company.

[38] General Refractories Company.

[39] H.R. Rep. No. 94-781, 94th Cong., 2d Sess. at 134 (1976).

Cost of service has always been recognized as one of the primary elements entering into the making and judging of railroad rates. With regard to the making of rates, carrier management, in an effort to maintain or increase the margin between costs and revenues, must use cost as the basis for decisionmaking. Regulatory agencies, involved in judging rates, are concerned with costs since pricing deviations therefrom are indicative of the imperfect operation of competitive forces.

For purposes of cost finding, this Commission employs several levels of cost. Variable costs, which are the minimum level of expenses which must normally be recovered by a carrier in providing particular services, are expenses which, over a long-term period, fluctuate with the volume of traffic handled.[43] The Commission has taken the position that variable costs represent a floor below which rates are ordinarily not permitted to fall, since the result would be a noncompensatory rate. Variable costs for railroads approximate 77 percent of total operating expenses, rents, and taxes, other than income taxes.[44] Conversely, fully allocated costs approximate 129 percent of variable costs. The presumption, which does not come into play until a rate reaches a level of 180 percent of variable cost, focuses only on rates which are well above that revenue level which is sufficient to cover all expenses, rents, and taxes, excluding Federal income taxes.

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[40] The 4R Act, § 202(f)(2).

[41] See "Panel Discussion—Cost Finding in Rate Cases," ICC Practitioners' Journal, Vol. XVIII, No. 2 (November 1950), pp. 123-148, p. 123.

[42] See *e.g.*, *Package Rates on Citrus Fruits*, 251 I.C.C. 691, 735.

[43] Variable costs include in addition to operating expenses, rents, and taxes, an allowance for the cost of equity capital invested in transportation property, plus interest on borrowed capital invested in such property. Constant costs represent the remaining body of operating expenses, rents, taxes (other than Federal income taxes), and allowance for the cost of equity capital interest on borrowed capital which are not included in the variable costs. Fully allocated costs, refer to the sum of variable costs and a statistical apportionment of constant costs. See *Rules to Govern Assembling & Presenting Cost Evidence*, 337 I.C.C. 298, 326.

We agree that variable rather than fully allocated costs should be used in this presumption. Variable costs control ratemaking in competitive situations. In order to maximize returns, a carrier will set a rate close to variable cost so that it may retain the largest possible volume of traffic when faced with diversion to competitors. The margin in the rate above variable cost reflects the value of service, or demand considerations. Appraisal of the value of service factor allows the carrier to set, depending on the presence or absence of competitive forces, the margin above variable cost that will result in the greatest contribution to overhead or constant cost. Railroads are able to shift much of the burden of constant costs to noncompetitive movements which, due to the lack of competition, consistently return more than their pro rata share of such costs. Thus, carriers are able to lower their rates in competitive situations and make up the difference in noncompetitive situations. Use of services having an inelastic demand is least affected by price or rate changes, while small price changes for services for which the demand is elastic have a substantial impact on their use. Therefore, marginal shippers having a highly elastic demand can be accommodated at rates close to marginal cost, while captive shippers having a low elasticity of demand can be used to cover the overhead and charged rates considerably above costs.

It should be noted, however, that as pointed out by the railroads and DOT, there may be instances in which differential pricing is not indicative of monopoly power, due for example, to the difficulty of ascertaining cost. Where a high margin above variable cost is not the result of monopoly position, it will not be difficult for the carrier to rebut the presumption of market dominance by introducing evidence indicating the existence of effective competition; for example, evidence can be introduced showing other carriers offering the same or interchangeable service, the rates charged therefor, and the approximate amount of traffic handled by these carriers.

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[44] "Rail Carload Cost Scales 1973," Interstate Commerce Commission, Bureau of Accounts (Washington, D.C.), Statement No. IC1-73, p. 150.

The argument made by the railroads, DOT, and Justice that the presumption should be discarded since existing costing procedures are inadequate, is not persuasive. Extant costing procedures, though imperfect, are accurate enough to allow the railroads to set their rates in most instances so as to secure the greatest net profit on a particular movement. In order to do this, it is necessary to know the costs of providing the service in addition to the degree of demand elasticity demonstrated by changes in the rate level.[45] The railroads, therefore, should have no difficulty in computing the variable cost for a particular movement, and in cases where shippers are responsible for providing the evidence, unit costs found in Rail Form A can be adjusted to fit the traffic or movement to which the rate in issue applies. In view of the pendency of docket No. 36367, Revision to the Uniform System of Accounts for Railroads, 41 F.R. 33016, August 6, 1976, in which a uniform railroad cost and revenue accounting and reporting system will be developed in accordance with section 307 of the 4R Act. It is inappropriate to discuss alternative methods of cost allocation at this time. However, methods of cost allocation other than those found in Rail Form A are acceptable to the extent that they portray accurate and reliable cost data.

The percentage above variable cost contained in this presumption is intended to focus attention on a rate level that antitrust pricing analysis would suggest is indicative of market power.

> The most recent rail revenue contribution study[46] shows that the great preponderance of commodity classes return revenues which are less than 180 percent of variable cost on both interterritorial and intraterritorial movements. A rate which exceeds this ratio will, in most instances, indicate some degree of market power. If experience indicates that the percentage figure should be raised or lowered, or if the test proves to be an inaccurate gauge of market power, the Commission will take appropriate action. [Footnote added.]
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> (4) A rebuttable presumption of market dominance will arise where affected shippers or consignees have made a substantial investment in rail-related equipment which prevents or makes impractical the use of another carrier or mode.

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[45] Carrier pricing policy has been summarized in the following manner: "Take each piece of traffic and starting with its out-of-pocket cost as a floor, add thereto such margin, considering the responsiveness of the movement to the rates charged as will maximize the contribution made to burden, but limiting the height of the rates on traffic with a relatively inelastic demand to that which is no more than necessary to make the carrier come out whole." See Ford K. Edwards, "The Emphasis in Transportation Pricing," Eastern Industrial Traffic League, Mid-Year Meeting, April 22, 1954, p. 9.

[46] "Rail Revenue Contribution by Commodity and Territory for the Year 1972," Statement No. 153-72, Washington, D.C. (April 1975) p. 6.

Representations.—Numerous parties[47] indicate support for a presumption relating to shipper-owned or leased rail-related equipment. These shippers indicate that they have invested substantial amounts of capital in railcars or in shipping and receiving facilities that have a predominant rail orientation. For example, Manufacturing Chemists Association notes that its member chemical shippers have purchased or leased 67,000 tanks cars, while National Steel Corporation states that its mills have been designed to accommodate rail transport. Shippers maintain that if they acquire specialized private cars, they must obtain maximum use of this equipment to make their investments reasonable. They also contend that often they are not in a position to use the services of other modes without increased capital investment. These shippers conclude that the practical effect of investment in rail-related equipment is to make them "captive" to railroad service.

Numerous electric utility companies[48] participating in this proceeding argue that some presumption relating to shipper-owned equipment should be adopted. The coal shippers contend that regardless of the situation for other commmodities, the railroads continue to be the dominant factor in the transportation of coal. The utility companies maintain that there is no viable alternative to reliance on coal to fuel a substantial part of their generation in the foreseeable future, and that they significantly depend upon rail transportation to deliver this commodity. The Property Owners Committee, which represents owners of coal-producing property, states that all-rail coal accounts for 49.6 percent of the coal traffic, while 70 percent of the coal moves at least partially by rail. Coal shippers maintain that there is often no other carrier and no other mode of transportation which can be used for these shipments because plants and mines are served by a single rail carrier. Further, they contend that motor transport is economical only over very short distances, that water transport is precluded where mines or plants are far from navigable waterways, and that coal slurry pipelines do not presently exist to serve their needs.

The utilities stress that there are a number of interrelated factors which effectively limit their flexibility in choosing transportation services. These include long-term supply contracts with coal mines, unit-train and annual-volume rates, and the purchase of rail-related equipment.

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[47] General Foods, The Fertilizer Institute, Farmland Industries, FMC Corporation, National Steel Corporation, Consumers Power Company, Potomac Electric Power Company, The Society of the Plastics, Inc., Firstmiss, Inc., Central Louisiana Electric Company, et al., GATX Corporation, and The American Electric Power Company.

[48] Consumers Power Company, The American Electric Power Company, Potomac Electric Power Company, Central Louisiana Electric Company, Central Power and Light Company, Gulf States Utilities Company, Houston Lighting & Power Company, and System Fuels, Inc.

Coal shippers maintain that long-term supply contracts enable the company to reserve sufficient mine capacity to meet unit-train loading schedules. Usually the purchaser is committed to a large volume of coal from a single source, which the utilities contend also often results in a commitment to unit-train transportation by the mine-serving carrier.

According to these shippers, unit trains are becoming more and more prevalent in the movement of coal to utilities, and through the development of these movements the rails have become the dominant or sole mode of transportation of coal to the generating plants. The electric utilities contend that in the establishment of unit-train and trainload rates on coal, the railroads have effectively shifted the responsibility for a substantial portion of the service to the shipper and the receiver.

Million-dollar investments have been made by users of unit-train and trainload rates in facilities such as railroad cars, scales, storage and loop tracks, rapid loading and unloading facilities, locomotives, and other equipment to allow them to meet the requirements imposed by the railroads for unit-train and trainload coal movements. For example, Wisconsin Electric Power Company states that before unit-train coal delivery was available the company was required to invest over $11 million in rapid unloading facilities at its Oak Creek, Wis., plant and to purchase additional specifically designed cars. Pepco notes that it recently purchased 160 railcars for local movement in unit-train service over the ConRail System. Coal shippers contend that the practical effect of this shift in emphasis to shipper-owned equipment has been to limit their ability to choose an alternative competitive transportation mode, if one were available.

DOT indicates that market dominance should be found in the case of rail transport of coal purchased under long-term supply contracts in force on a specified date. In addition, DOT suggests that the Commission should accept contract transportation rates negotiated by public utilities, rail carriers, and mines.

The railroads maintain that to presume an absence of effective competition automatically where shippers have invested in special rail-oriented equipment is unwarranted. They argue that most specialized equipment is readily marketable, and that shippers can alter their use of the various transport modes in response to changing competitive conditions.

b. *Conclusions.*—This presumption will be particularly helpful in aiding Commission identification of those situations where, irrespective of the share of the market possessed by the proponent rail carrier, affected shippers will have no realistic alternative to continued rail use during the period in which the rate in issue will be in effect. If a market is to be truly competitive, shippers must be able to respond quickly to changes in transportation charges. They must be in a position to shift their demand from one rail carrier to other rail carriers or carriers of other modes. Such a shift in demand requires not only the availability of carriers ready to provide a comparable service, but also the ability of the shippers to take advantage of that service. Shippers must be able to make the choice to use an alternative service without absorbing substantial economic loss. The greater the cost of making a shift in carriers, the greater the chance that the carrier will be in a position to extract substantial premiums without fear of diverting traffic to other carriers.

A shipper's investment in rail-related facilities ordinarily reflects a business judgment that rail transportation will be the most economical for its purposes, at least in the near future. In making this decision the shipper must consider its total transportation costs. The total rail transportation cost is the rail rate plus the expense of the rail-related equipment which could theoretically be allocated to a particular movement. If the movement is in shipper-owned or leased cars, the carrier either publishes a special rate for freight moving in shipper-owned cars or publishes an allowance. The shipper has made a commitment to paying at least the part of the rail transportation cost represented by the allocated cost of the rail-related equipment. It is true that at some point the shipper may attempt to minimize his losses by selling his equipment, but such a change in operations usually cannot be accomplished without a substantial loss to the shipper. If the capital investment represents a substantial portion of the total transportation cost, then the rail carrier may be in a position to increase its rates substantially without fear of diverting a significant amount of traffic to the other mode. Under these conditions, the rail carrier would have market dominance over the service in question.

Further, the presumption relating to shipper investment in rail-related equipment is consistent with section 206 of the 4R Act. In this section, Congress has provided certain incentives for capital investment in rail-related facilities. The new section 15(19) of the

Interstate Commerce Act now protects rates where their implementation requires a total capital investment of $1 million or more "individually or collectively, by such carrier, or by a shipper receiver, or agent thereof, or an interested third party." The Commission is prohibited from suspending or setting aside these rates as unlawful under sections 2, 3, and 4 of the act until 5 years after their publication. The purpose of the section is to create an atmosphere conducive to capital investments to improve the quality of rail service. Regulations implementing the provisions of section 15(19) of the act have been proposed by the Commission, in Ex Parte No. 327, Rate Incentives for Capital Investment, 41 F.R. 32434, August 3, 1976.

However, this provision does not protect shippers' past investments in rail-related facilities. In making these previous investments in rail-related equipment and facilities shippers have assumed that redress is available from this Commission should the carrier attempt to establish rates which are unreasonably high. If carriers are able to exact a premium for their services, shippers may be hesitant to continue to invest in rail-related equipment. In addition to being an appropriate means of achieving accurate factfinding, without delay, the presumption is also necessary to preserve an atmosphere which is conducive to rail-related capital investments by shippers.

To rebut this presumption a rail carrier may show, for instance, that several shippers are taking the rate in question but that the preponderance of the traffic in terms of volume is tendered by shippers who have not made substantial investments in rail-related equipment. The carrier could also show that the shipper has not made such a substantial investment that it is effectively dependent on rail transport. Another means of rebutting the presumption would be to show that there is an interchangeable service available from other rail carriers. If there is another rail carrier that has not engaged in joint consideration of the issue tariff with the proponent carrier there may be effective intramodal competition.

EVIDENTIARY REQUIREMENTS AND PROCEDURAL CONSIDERATIONS

Identification of factual patterns which imply the absence of effective competition requires that the Commission have access to all practicably available relevant data.[19] To aid the Commission in making this determination, certain information relating to the presumptions will be required from the parties.[50] Other required facts, such as comparative rates, mileage, commodity characteristics, and the extent to which the proponent railroad has taken recently approved general increases, will always be relevant, but cannot be suitably framed in the context of a presumption at this time. In addition, we will outline areas where evidence, although not mandated in every case, appears generally relevant and helpful.

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[19] We wish to make it clear, however, that all evidence relevant to the presence or absence of effective competition will be considered, whether or not a presumption will result therefrom.

Our requirements are based on the belief that the expedited procedure called for by the 4R Act will only be feasible if the party which is the best source of available information furnishes it in every case. Since most of the necessary information, other than tonnage, is often equally available to both carriers and shippers, initial responsibility for submittal will vary depending on the type of proceeding. Tonnage has been given uniform treatment in all proceedings, depending on which party may more readily obtain the information sought.

In cases which result from a new or increased rate, the proponent rail carrier has the advantage of being able to gather extensive information before the rate is filed. Sound management practices would dictate that no rate increase be made without informed carrier pricing decisions. Protesting shippers may have 10 days or less to attempt to gather information which can only be practicably compiled over a much longer period. Thus, much information is best supplied by the rail carrier. In a formal complaint case, the complainant, who controls the filing of the initial pleading, should assume a heavier burden of data submission. In a proceeding instituted by the Commission, responsibility should be shared by all parties.

Where a carrier gives the required statutory notice that it intends to proceed under section 15(8)(c) of the act, it must provide the Commission with information which will expedite the factfinding process. When a carrier uses this provision, a finding of market dominance must be made before the proposed rate may be suspended. Since section 6(3) of the act requires only 30 days' notice before the proposed rate will become effective, the time constraints on the Commission are severe and submission of all relevant information is required at the earliest possible time.[51] In other situations, a determination as to market dominance must be made within 90 days of the institution of a proceeding challenging a rate as unreasonably high. This would include the establishment of initial rates and those increased rates to which section 15(8)(c) does not apply.[52] In such cases, any protest of the rate must contain all market dominance information available to the protestant, and the rail carrier must submit certain required information, ***whether or not it elects to file a reply to the protest.*** This requirement is necessary in order to insure that the Commission has adequate data on which to base its determination in cases where carrier action has precipitated the proceeding and shippers may not have sufficient information available to enable the Commission to make an informed decision.

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[50] These requirements are set out in appendix C.

[51] While some shippers have urged that the notice to proceed under section 15(8)(c) be required before the rail carrier files the rate increase, we question whether we have the power to do so. Enabling or clarifying legislation from Congress would be helpful in allowing shippers a more meaningful period in which to develop necessarily complex factual presentations.

In a formal complaint case under section 13 of the act, primary responsibility for submission of evidence must lie with the complainant. Only if the rail carrier elects to file a reply must it present required information. To mandate carrier submittals in all complaint proceedings might encourage "fishing expeditions" by some complainants and unduly enlarge the number of such proceedings before the Commission.[53]

Where the Commission institutes, on its own initiative, an investigation as to whether an existing or proposed rate is unreasonably high, the parties should share responsibility for production of relevant material.[54] The carrier should submit all relevant information as outlined in section 1109.1(e) and the replicants should then submit all other necessary information and countervailing arguments.

Some parties maintain that the time periods for filing in an investigation instituted by the Commission should be made equal for all parties.[55] Others suggest that shipper replies in such proceedings should not be due until a requisite number of days after the due date for carrier filing, rather than after the date on which filing actually occurs.[56]

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[52] See note 9, *supra*.

[53] However, in investigation and suspension cases no such danger exists since railroad action increasing a rate precipitated the proceeding, and the necessity for expedited informed Commission decisionmaking is imperative.

[54] While section 15(8)(c) of the act prevents suspension of a rate which has not previously been found to be subject to market dominance under certain conditions, the Commission may nevertheless investigate such a rate provided a determination of market dominance is made within 90 days of the institution of the proceeding.

[55] Farmland Industries, Inc., National Council of Farmer Cooperatives; Copper Development Association, Inc., Fertilizer Institute, Firstmiss, Inc., American Paper Institute, and American Bakers Association.

We agree that the railroads and shippers should have equal opportunity to gather helpful evidence in a proceeding instituted by the Commission. We will require shipper replies within 20 days of the due date for the filing of the carriers' initial pleading. This represents the maximum period within which a workable framework for ascertaining the issue of market dominance within the 90-day limit can be maintained. We believe that this reply period is justified to afford shippers a reasonable period in which to prepare their evidence, and here Commission determination will be aided by our own preliminary investigation.

a. *Notice to shippers.*—Many shippers are concerned that they will not receive sufficient notice to allow timely development of complex evidence where a rail carrier elects to proceed under section 15(8)(c) of the act. FS Services, Inc., and International Minerals and Chemical Corporation suggest that a rail carrier seeking to use the provision be required to file the necessary statutory notice 30 days before publication. Others would like notification to shippers before publication.[57]

Section 15(8)(c) of the act requires notice to the Commission that the rail carrier intends to proceed under that provision, but does not specify when the notice must be given. We are mindful that our notice served February 17, 1976, requires that the information contained in any notice to proceed under section 15(8)(c) of the act be furnished to each subscriber to the tariff or schedule at the time each is furnished its copies of the publication as provided by the rules adopted in docket No. 35613, ***Regulations—Transmission of Tariffs and Schedules,***[58] 349 I.C.C. 119 (1975). We are now persuaded that the complexity of the evidence upon which a decision must be based necessitates that the Commission have before it a record in which shippers have had a meaningful time to develop available material. While the previously required notice was otherwise adequate, we are now convinced that shippers must receive the required information[59] by the date on which the notice and the new or revised tariff or schedule are filed with the

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[56] National Council of Farmer Cooperatives; National Industrial Traffic League; American Paper Institute; and American Bakers Association.

[57] Farmland Industries, Inc.; Copper Development Association, Inc.; and General American Transportation Corp.

[58] Now contained in 49 CFR 1300.30, as herein pertinent. The full text of the February 17 notice is contained in appendix E.

[59] Only information set out herein and in our notice of February 17, 1976, is required.

Commission. We will assume that this has been done where the information was transmitted 5 days before the filing date. All other provisions of docket No. 35613 remain in full force and effect, with this one exception.

b. *Tonnage information and related problems.*—Many parties have commented on our initial proposal regarding the submission of market share information. Numerous shippers believe that tonnage information should be limited to a period of 1 year prior to the filing of the initial pleading.[60] Some who support periods longer than 1 year believe that tonnage figures should be segregated into 1-year blocks.[61] Du Pont suggests that dollar volume moving under the rate in issue might serve as an additional measure of market share. Many shippers argue that development of tonnage information for each set of points under a rate would be highly impractical or impossible.

The problem of confidentiality of tonnage information is also raised. Several parties, including Allied Chemical Corp., Stupp Corp., the Society of the Plastics Industry, Inc., and Bethlehem Steel Corp., have pointed out that section 15(13) of the act[62] prohibits a rail carrier from disclosing "information concerning the nature, kind, quantity, destination, or routing of property tendered or delivered such carrier" where this information "may be used to the detriment or prejudice of such shipper or consignee or improperly disclose his business transactions to a competitor." Some parties argue that principles of confidentiality should be extended to permit shippers to keep data pertaining to freight tendered to other carriers or modes from the proponent rail carrier. Allied Chemical also contends that the requirements of the Freedom of Information Act would make it impossible for the Commission to safeguard the confidentiality of such information within its files.

We are persuaded that a 1-year period for tonnage figures is the most appropriate under present circumstances. While a longer period would allow more detailed analysis, we recognize that difficulties in the development of tonnage information by concerned parties may make submission of figures for periods longer than 1 year impractical at this time. Therefore, market share data may be limited to the 1 year preceding the filing of the initial pleading in each proceeding. We recognize that future development of this information may enable this Commission to extend consideration to a more economically significant time frame at some later date.

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[60] Justice believes that a 2-year period would be satisfactory; Western Fuel Association would require 5-year tonnage figures.

[61] Farmland Industries, Inc.

[62] Formerly section 15(11) of the act.

There is no indication from the record that dollar-volume data is more easily obtainable than tonnage information or that its use avoids problems of confidentiality. We believe that tonnage figures are the best indicators of market share. If they are not available, dollar volume may be shown if it is a reasonable indicator of market share under the circumstances.

While we encourage the development of tonnage information where feasible, we do not intend to mandate that additional records be kept or that tonnage information be presented where it is unduly burdensome to do so. While market share is one of the most reliable indicators of market dominance, it is not an exclusive measure, and the absence of reliable tonnage information will not preclude either a finding of market dominance or effective competition.

Parties asserting a confidentiality argument based on section 15(13) of the act have glossed over the proviso at the end of that section which authorizes the giving of such information "in response to *** any officer or agent of the Government of the United States *** in the exercise of his powers." This language clearly would permit the Commission to require submission of tonnage figures to aid the exercise of its power to determine the existence of market dominance. Thus, the issue presently before the Commission is not whether it possesses the power to require tonnage information, but to what extent it should exercise its power in this instance.

The argument that the Commission would be unable to safeguard confidential information because of the Freedom of Information Act is without merit. The provisions of 5 U.S.C. 552(a)(3) generally require prompt agency publication of its records to any requesting person. Section 552(b)(4) permits an exception for "trade secrets and commercial or financial information obtained from a person" which is "privileged or confidential." Applicable case law shows that the tonnage information envisioned here would fall within this exemption. In *Green* v. *Kleindienst,*[63] the court indicated that business information required by the "business review" letters of the Department of Justice, Antitrust Division, might come within the "confidential information" exemption.[64] *Sears Roebuck, and Company* v. *General Services Admin.,*[65] held that plans relating to future corporate mergers, expansions, reductions, and other major shifts in personnel requirements came within the exemption. In *National Parks and Conservation Association* v. *Morton*,[66] the District of Columbia Circuit Court of Appeals stated that a person seeking to use the exemption must show either that disclosure would impair governmental ability to obtain necessary information or that it would cause substantial harm to the competitive position of the person from whom the information is obtained.[67] It appears that the disclosure of tonnage figures is within the scope of both parts of this alternative test.

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[63] 378 F. Supp. 1397 (D.D.C. 1974).

[64] The case was decided on the basis of another exemption for "an investigatory file compiled for law enforcement purposes."

[65] 384 F. Supp. 996, affirmed 509 F. 2d 527 (D.C. Cir. 1974).

The Freedom of Information Act neither authorizes nor prohibits the disclosure of exempt confidential information.[68] Due regard must be given any otherwise applicable substantive law, such as section 15(13) of the act, and the interests of all parties.

We believe that disclosure of tonnage data may, in many instances, involve confidential shipper information for the reasons set out below. It is desirable to maintain the confidentiality of sensitive trade information where possible, and where it is not possible, submitted figures should be kept to the necessary minimum. We reject any approach which would require submission of detailed unessential information. However, no market share test can possibly be useful unless total tonnage for the proponent railroad and for other asserted effective competitors can be derived. The former should be furnished by the railroad, since most shippers will not have access to specific tonnage figures other than their own. Tonnage from other carriers must be supplied by all parties to the extent available. Shippers seeking to use a market share presumption must indicate the total amount of traffic which they themselves tender to other carriers and what those carriers are. This information need not be segregated for each carrier, but should indicate totals for each mode used. If a railroad wishes to assert that other carriers should be included in market share computation, they must name each and state what total tonnage it moves.

Among the reasons advanced for maintaining the confidentiality of tonnage information is the necessity for shippers to keep customers from knowing what share of their needs they are supplying, and the fact that the size of operations for some commodities may reveal unit production costs and enable competitors to determine production capacity. Where public revelation of tonnage information would unduly reveal details of a shipper's operations so as to damage its competitive position, the need for confidentiality is manifest.

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[66] 498 F. 2d 765 (D.C. Cir. 1974).

[67] The court there rejected the argument that those in a monopoly position could not raise the "competitive position" argument, noting that disclosure might injure a party's competitive position in other markets.

[68] See *Charles River Park "A", Inc.* v. *Dept. of Housing and Urban Development*, 519 F. 2d 935 (D.C. Cir. 1975).

The form of tonnage submissions has been designed to reduce problems of confidentiality to the greatest extent possible, taking into account the need for a workable market share test. However, the danger of damage to a shipper remains greatest when the number of shippers moving under the rate in issue is small. In such a case, the total tonnage figures submitted by the railroad may well serve as a usable basis for extrapolating the amount of traffic tendered by each shipper.[69]

We believe that our provision permitting consideration of areawide tonnage figures (discussed below) where a rate applies to more than one origin or destination point should lessen potential problems arising where a rate applies to several origins or destinations and the names of shippers and consignees at various points are well known to competitors.

Tonnage information must be submitted on a separate sheet marked "CONFIDENTIAL." Any party wishing to maintain the confidentiality of tonnage data must submit, together with its initial pleading, a request for confidentiality and provide reasonable explanation why market share information submitted by it or another party should be so treated. If a carrier submits confidential information in a reply pleading, a supplemental request may be filed. Pending a request for confidentiality, all tonnage information will be separated and kept out of the public docket. If a request is not timely received, the information will be placed in the public docket. The determination whether to grant the request for confidentiality will be based on whether revelation of the information would cause substantial harm to the competitive position of the requesting party. When a request for confidentiality is granted, access to the information will be limited to the parties to the proceeding. We believe that this approach represents the best method of balancing the need for informed decisionmaking with the shippers' need to protect confidential trade data from competitors.

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[69] While it is true that the section 552(b)(4) exemption will not apply where the information does not reveal identity (see *Continental Oil Co.* v. *F.P.C.*, 519 F. 2d 31, 36 (5th Cir. 1975); *National Cable Television Association* v. *F.C.C.*, 479 F. 2d 183, 195 (D.C. Cir. 1973)), the court in *National Cable* indicated that identity may be revealed by unique circumstances (such as here) just as if the party had actually been named.

Arguments that tonnage information pertaining to carriers competing with the proponent railroad should not be divulged to the railroad are untenable. Any party which wishes to dispute a carrier's documented market share evidence must produce countervailing evidence of his own. Due process would not permit a market dominance determination where all the evidence of record was not available to both sides.[70] If a shipper wishes to keep such evidence from other parties by withholding it from the record, he may do so but he will be precluded from contesting any properly documented railroad market share evidence and will have to show market dominance, if at all, by some other means.

c. *Rate bureau activity.*—Shippers will not always possess data regarding the extent of rate bureau activity with respect to the rate in issue. Since the proponent railroad would always have this material readily available, it must be the primary source of information in all cases. Accordingly, a proponent rail carrier must state whether the rate has ever been discussed, considered, or approved by any rate bureau or members of any rate bureaus, and describe the extent of any such activity. The rate bureau application number, the date the proposal was docketed with the rate bureau, and the final disposition of the proposal and the date thereof must be stated. All alleged effective competitors which participated in the activity must be named. The share of the market presently held by all participating carriers, or an estimate thereof, must be given. Where specific figures are available, estimates cannot be used. The source of any estimate must be stated and explained. Either party may, of course, supplement or explain this basic information.

d. *Other required information.*—The railroads have suggested, and we agree, that they should provide the basic information as to the scope and applicability of the tariff provisions in question. A detailed description of the points or areas involved in the traffic or movement in issue is always necessary. Descriptions of involved commodities, including full seven-digit STCC numbers, must be provided. Mileage between points in the applicable tariff must also be given. While no affirmative representations on this point appear in the record,[71] we believe that the mileage basis should be that which is the most convenient to the parties. It appears that the most appropriate measure is short-line mileage by any railroad.

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[70] 5 U.S.C. 552(a)(2) permits the deletion of identifying details when an agency makes available or publishes an opinion "to the extent required to prevent a clearly unwarranted invasion of personal privacy." 5 U.S.C. 551(2) provides that a corporation is considered a "person" for the purposes of the Freedom of Information Act. Accordingly, where a party has requested confidentiality and shown the need therefor, any subsequent report or order will state its market share finding in terms of "greater than 70 percent" or "less than 70 percent."

We assume that a carrier which has been able to take the full amount of recent ex parte increases will be in a less competitive situation than a carrier which has not. While we do not consider this type of information to be properly subject to a presumption, it constitutes important evidence to be considered in every case. Therefore, we will require the proponent rail carrier in each case to show the extent to which it has taken general increases approved by the Commission in the preceding 2 years.

e. *Rates involving more than one origin, destination, or commodity.*—Some shippers have argued that where a rate covers more than one origin, destination, or commodity, carriers be required to show tonnage moving between every set of points for each affected commodity.[72] The railroads would require all tonnage information from shippers and assert a penalty in the form of a conclusive presumption of effective competition for failure to produce this data.

Rates applying to more than one origin, destination, or commodity are usually published because the affected points or commodities reflect similar transportation characteristics. With the exception of transcontinental rates, common origin or destination points subject to the same rate will usually be within a relatively small geographic area. In many instances, competitive conditions will be reasonably uniform to and from all involved points, particularly where the number of differing origins or destinations is small. However, such factors as differing motor carrier authority, varying access to water transportation, absence of uniform traffic levels within the area, and differences in transportation conditions may indicate that some points within the area are subject to significantly different competitive circumstances from those generally applicable within the encompassed area.

Commodity or commodity column rates are ordinarily published because the subject commodities have similar transportation characteristics or costs. These commodities will often be subject to similar competitive conditions.

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[71] Several shippers have raised the question of what basis should be used to compute any required mileage figures. Among those mentioned are docket No. 28300 mileage, actual mileage between origin and destination points, short-line mileage by any railroad, mileage between terminal areas, and shortest tariff route.

[72] Fertilizer Institute; Drug and Toilet Preparation Traffic Conference, et al.; and Pacific Northwest Traffic League.

It must be recognized that a requirement that the rail carrier show competitive circumstances in every instance between each pair of affected points and for each commodity would result in an unwarranted administrative burden, and might disrupt the existing rate structure. Therefore, we will permit the railroads to submit evidence which reflects areawide or all-commodity competitive circumstances, where the rate in issue applies to more than one origin, destination, or commodity. For example, tonnage need not be segregated for each set of points, and average mileages may be used. However, in order to avoid distortions of actual competitive conditions, evidence must be limited to those commodities and points which represent more than a de minimus amount of the actual traffic moving under the rate in issue. A shipper will always be permitted to show that broadly based evidence does not reflect the actual competitive circumstances of his traffic. Specific reasons for this disparity must be shown. In each instance, the Commission will then consider whether actual competitive circumstances would be reflected or distorted by the areawide or all-commodity evidence.

f. *Treatment of distinct accessorial charges.*—Conceptual problems arise where a separate rail charge for a transportation related service is attacked, but no line-haul charge is disputed. At issue is whether examination should encompass only the particular involved service, or *all* services, including the related line-haul service, which necessitate that particular service. In the case of transit or other special services, such as refrigeration, heating, icing, diversion, reconsignment, storage, transfer, drayage, and weighing, separation of competitive circumstances between the special service and the line-haul rate would be impractical if not impossible. In the case of terminal services, such as switching, floating, lighterage, wharfage, loading, and unloading, separation may not be as difficult.

We recognize that modes which compete with rail service often do not segregate charges for accessorial services from the line-haul rate, making comparisons difficult. The most promising approach is to consider the competitive conditions surrounding all services, including line-haul service, which necessitate the particular service in issue. Rebuttal evidence may be offered to show that the competitive conditions surrounding the particular service are substantially different.

g. *Initial rates.*—While the provisions of section 15(8)(c) of the act only apply to rate increases and decreases, a finding of market dominance is mandated by section 1(5)(b) of the act where a rail carrier seeks to establish an initial rate which is attacked on the basis that it exceeds a just and reasonable maximum. In view of the fact that in any given year only a de minimus number of initial railroad rates are filed, we have prepared no presumptions in this area.

h. *Other relevant evidence.*—We have outlined many relevant areas previously. The ensuing discussion is intended to provide further guidance to all parties by indicating areas in which evidence may be relevant. It is not intended to be an exhaustive survey of all forms of relevant evidence.

It should be understood that the issue of whether the rate in issue is just and reasonable has no direct bearing on the issue of market dominance. Our procedures should in no way be taken to imply any finding as to what constitutes a maximum just and reasonable rate. However, since a finding of market dominance is only required when a rate is attacked as exceeding a just and reasonable level, both issues will be present in all proceedings concerning market dominance. To aid prompt determination of both issues, all parties should separately state and label evidence pertaining to both issues in their pleadings.

Evidence will be relevant to a determination of the issue of market dominance if it relates to either structure, behavior, or performance of the involved market for transportation services. More specifically, the attention of the Commission will be directed to the question of whether there exist sufficient commercially feasible and reasonably available transportation alternatives from other for-hire carriers or modes to insure that a rate increase by any competing carrier will result in more than a de minimus diversion of demand for transportation service during the period in which the rate in issue will be in effect.

Unusual weight, size, or other physical characteristics of involved commodities tending to make their transportation by other modes impractical or impossible may always be shown. However, competition from other rail carriers might well be present. Examples of such a situation would include oversized commodities and commodities which move in bulk.

Mileage of the involved traffic or movement may indicate a market structure in which the railroads will not face effective competition. While the point at which this will take place will vary with different commodities, it is generally recognized that motor carriage cannot effectively compete with the railroads for certain commodities over long distances. Water competition may prove effective if the points or areas involved have reasonable access to it.

Evidence of large differences in rates between carriers or modes is also relevant, provided such differences are not due to demonstrable variation in quality or costs of service. We conclude that the presumption approach would not be an appropriate method when dealing with comparative rates because differences in service are not easily measured. Nevertheless, we consider rate differentials to be a relevant factor. We cannot agree with the railroads' claim that large rate variations would indicate the existence of railroad "paper" rates. It is difficult to imagine why the railroads would increase a rate which does not move traffic. In those rare instances where an attack is made upon an existing paper rate, the railroads are free to show that fact.

Another indicator of market structure and performance is the presence or absence of price or service competition. The absence of either will not be determinative if the other is demonstrably present. Service competition may be indicated by significant differences in speed, availability, dependability, and quality of transportation service. The absence of price competition may be indicated where strikingly similar pricing actions, unrelated to the cost of service of the increasing carriers, are taken within a short time by allegedly effective competitors. Other factors which might indicate the absence of price or service competition include the presence of stable rate differentials *and* market shares between alleged effective competitors over a long period of time, and the absence of any diversion after a reasonable time following a rate increase.

The ability of other carriers and modes to take on additional traffic is an important factor. Current availability of unused capacity, as well as the potential for future expansion, will be considered. Certainly, effective competition cannot exist where other competing carriers could not take on additional traffic in the near future.

Just as the size and relative bargaining power of the proponent rail carrier is an important element in determining its ability to set rate levels, so must the bargaining power of affected shippers in rate negotiations with the railroads be given due consideration. When other for-hire transportation alternatives are available, shipper bargaining power may play an important role in limiting the amounts of rate increases. The amount of traffic tendered the railroads and the impact that diversion of that traffic would have on carrier revenues are factors which may enhance shipper bargaining power.

The presence of predatory noncompetitive practices involving the traffic or movement to which the rate applies may always be shown.

Proof of these activities will lead to a strong inference that effective competition does not exist.

i. *Conclusion.*—The vast number of possible competitive situations necessitates a case-by-case approach where no presumption is warranted. Although a complete case-by-case approach would not allow for a practical determination without administrative delay, complete reliance on presumptions would not permit the flexibility necessary to make informed decisions in cases presenting complex factual situations. The continuing nature of this proceeding will permit reevaluation of the various evidentiary considerations, based upon changing conditions and the dynamics of the transportation industry.

Standards and procedures in this proceeding must be established on or before October 4, 1976, pursuant to the directive of section 202(b) of the 4R Act. The Commission desires to solicit further comments from all parties before adopting the regulations set out herein. All comments will be due within 20 days of the date of service of this report and order. The short period of time remaining before the final standards must be implemented precludes consideration of replies to these further comments. No extension of time for filing of comments will be granted. Following establishment of standards and procedures, petitions for reconsideration may be filed.

The concept of market dominance, including a definition of the relevant transportation market, presents a unique problem in rate regulation. For that reason, further comments by the parties on these matters have been requested. Moreover, as experience is gained in the implementation of this concept, refinements and modifications may be required. Accordingly, this proceeding will remain open so that parties and other concerned persons may petition for any changes they believe are necessary.

FINDINGS

We find that implementation of the standards and procedures contained herein would enable the Commission to make prompt determinations as to market dominance without undue delay, in accordance with the congressional intent expressed by section 202 of the Rail Revitalization and Regulatory Reform Act of 1976.

We further find that the proposed rules are sound, equitable, and reasonable, and that the principles contained therein should be adopted, subject to consideration of further comments in this proceeding.

And we further find that this is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

COMMISSIONER CORBER, concurring in part:

This is an interim report subject to further comments of the parties. On that basis I support the position of the majority except for the presumption of market dominance whenever a rate exceeds 180 percent of variable costs. I do not believe the 180 percent figure is justified on the current record.

In constructing the market dominance concept Congress was attempting to strike a balance between the need for rail carriers to be relieved of regulation of rates, with its attendant delay and restraints on timely responses to changing circumstances, and the need of the public to be protected from unwarranted rate increases. Competition is to provide the weights to be substituted for regulation in assuring that the balance is struck. Thus, on one hand, rail carriers are to be "free from regulation in markets sufficiently competitive to prevent abuses of monopoly power."[73] On the other hand, " *** there is today an increased emphasis on problems of potential inflation and consumer protection. Consequently, ratemaking revisions to assist the railroads must continue protections for the public interest."[74] I am not persuaded that the 180 percent standard achieves the sensitive balance sought by Congress because it could allow many rates not subject to effective competition to be beyond the protections intended for the public interest.

Congress has defined market dominance to mean not simply lack of competition but lack of *effective* competition. If the marketplace were perfectly competitive, all rates would gravitate toward marginal cost. "The consequence will be that, after consumers have made allowance in their choices for possible differences in the quality of service, the competing company with the lowest long-run marginal costs will get the business; and the services will be provided by those companies which, in doing so, will impose the minimum opportunity costs on the economy at large." 1. A. Kahn, "The Economics of Regulation," 161 (1970). Conversely, where rates exceed longrun marginal cost, the carrier charging those rates is exercising monopoly power. "It takes monopoly power to hold price above marginal cost in the price-inelastic market." *Id.* at 159.

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[73] Report of the Senate Committee on Commerce on S. 2718, S. Rept. No. 94-499 (November 1975), p. 11.

[74] *Id.*, at 14.

Effective competition would produce results tending to approximate those of a perfectly competitive marketplace. To the extent that a carrier is exacting rates in excess of marginal cost there is, then, a lack of effective competition—there is market dominance. In terms of the logic of economics, therefore, market dominance should be presumed whenever a rate exceeds the longrun marginal cost of performing the transportation to which that rate applies.

It should be reiterated here that the market dominance test is merely a threshold determination. A finding of market dominance in no way affects the issue of the justness and reasonableness of any rate. It is understood that because some traffic can be attracted only by rates below marginal cost, other rates must be set above that level. The market dominance test merely directs the Commission's energy and resources to those rates whose lawfulness deserves a closer examination.

Our best approximation of the railroads' longrun marginal costs, including a reasonable profit margin, is 140 percent of their variable costs. However, it is recognized that the Commission's costing techniques are not exact. Accordingly, allowing a 10-percent margin of error in calculating marginal cost would be justified. It follows that, to be consistent with the principles on which a cost-based presumption is founded, presuming the existence of market dominance whenever a rate exceeds 150 percent of the variable cost of the transportation to which that rate applies would not be unreasonable. This question should receive further consideration on the basis of the additional comments of the parties.

COMMISSIONERS MURPHY AND O'NEAL did not participate.

APPENDIX A

NOTICE OF PROPOSED RULEMAKING AND ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D.C., on the 10th day of March 1976

EX PARTE NO. 320

SPECIAL PROCEDURES FOR MAKING FINDINGS OF MARKET DOMINANCE AS REQUIRED BY THE RAILROAD REVITALIZATION AND REGULATORY REFORM ACT OF 1976

This rulemaking[1] is designed to establish standards and procedures for determining whether and when a rail carrier possesses market dominance over a service. Market dominance is defined by Congress as "an absence of effective competition for the traffic or movement to which a rate applies from other carriers or other modes of transportation."[2] A market dominance determination is a threshold test designed to focus the Commission's regulatory efforts on areas in which competition is insufficient to protect the public from unjust and unreasonable rates. Conversely, the rail carriers are given flexibility to increase rates where there is effective competition.

The legislative history of section 202 demonstrates that the Commission is not to be strictly bound by antitrust concepts and precedents. It is clear that lengthy antitrust-type proceedings are not contemplated. Section 1(5)(d) of the act directs the Commission to design rules providing for a "practical determination without administrative delay."

Under the act, as amended, the Commission must make a market dominance determination within 90 days of the institution of a proceeding in which a rate is challenged as being unreasonably high.[3] In some instances, where suspension of new or changed rates is at issue, the determination may be required within 30 days of the rate filing.

These statutory time constraints require a shortened procedure. Evidence must be promptly gathered and measured against practical substantive standards for decisionmaking. The most promising approach is to identify certain fact patterns which imply market dominance and to require the submission of readily available evidence which will establish these fact patterns.

The rules proposed here provide for a rebuttable presumption that the carrier has market dominance over a service under specified circumstances. The presumption arises whenever the evidence establishes the existence of one or more of seven factual patterns which imply a lack of effective competition. In addition the rules provide for the submission of evidence relevant to these factual patterns.

The first factual pattern relates to rates considered and/or discussed before a rate bureau. In the Conference Report which accompanied the Railroad Revitalization and Regulatory Reform Act of 1976 as finally passed, Congress instructed the Commission as follows:

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[1] This proceeding implements amendments to the Interstate Commerce Act (49 U.S.C. 1 *et seq.*) (the act) contained in section 202 of the Railroad Revitalization and Regulatory Reform Act of 1976, Public Law 94-210.

[2] Section 1(5)(c)(i) of the act.

[3] The revised provisions do not affect the power of the Commission to suspend rates or to find rates unlawful under sections 2, 3, and 4 of the act, or on the grounds that they constitute predatory or anticompetitive practices which are contrary to the national transportation policy

> Inasmuch as the new section 5b permits the consideration of rates free from the antitrust restrictions which would otherwise control competitive markets, the Committee of Conference intends that there will be presumed to be an absence of effective competition between railroads with respect to any rate discussed or considered under an agreement approved by the Commission pursuant to new section 5b of the Interstate Commerce Act. [H. R. Rep. No. 781, 94th Cong., 2d Sess. 148 (1976).]

The second and third factual patterns address directly the presence or absence of competition. The second looks to market share, and the third looks to pricing behavior.

The fourth and fifth factual patterns identify market dominance by focusing on the carrier's ability to exact a premium for its service. The fourth is based on rate relationships, while the fifth is based on the economic concept of monopoly pricing.

The sixth and seventh factual patterns identify service and commodity characteristics of markets where railroads have traditionally been free of effective competition.

Because Congress has required that this rulemaking be completed within 240 days, a strict timetable must be followed, and it is extremely unlikely that any extensions of time for the filing of pleadings will be granted.

It appearing, That the establishment of standards and procedures for determining whether and when a carrier possesses market dominance over a service rendered or to be rendered at a particular rate or rates is mandated by section 1(5)(d) of the act.

It further appearing, That Title 49 of the Code of Federal Regulations should be amended by the addition of part 1108 to read as follows:

Part 1108 Requirements and Procedures Relating to Railroad Revitalization and Regulatory Reform Act of 1976

§1108. 1 *Requirements and Procedures Relating to a Determination of Market Dominance with Regard to Just and Reasonable Maximum Rates*[1]

(a) In order that the Commission may determine whether a carrier proposing a rate increase possesses market dominance over the service to be rendered under a proposed rate, there shall be included in the carrier's statement notifying the Commission that it wishes to have such proposed rate considered pursuant to section 15(8)(c) of the Interstate Commerce Act, evidence upon which the Commission can base a determination with regard to market dominance including but not limited to the following information: (1) STCC number(s) and descriptions of commodities involved; (2) the mileage involved in the subject movement; (3) Whether the proposed rate has been discussed or considered in proceedings before a rail carrier rate bureau acting under an agreement filed with and approved by the Commission pursuant to section 5b, or the former section 5a, of the Interstate Commerce Act; (4) tonnage of the involved commodity shipped between the involved points during the preceding 3 years by the proposing carrier and its affiliates, and the rates charged therefor during the same time period; and (5) the fully allocated cost of the service to which the rate applies.

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[1] As used in this section, the term rates includes fares and charges.

(b) In all proceedings involving a request for suspension of a proposed rate, there shall be included in the verified complaint seeking suspension of the schedule containing the proposed rate,[5] evidence upon which the Commission can base a determination with regard to market dominance, including the information outlined in subparagraphs (a)(1)-(5), to the extent available and not previously furnished by the rail carrier, and the following information: (1) names of originating carrier(s) (rail, motor, water, other) if any, offering the same or interchangeable service between points involved and the rates charged therefor during the preceding 3 years; (2) if filed by a shipper, the percentage of its traffic handled during the preceding 3 years by the proposing carrier, and, if applicable, by the carriers listed under §1108.1(b)(1); and (3) if filed by a shipper, characteristics of the involved commodity affecting the ease with which transportation services of other rail carriers or other modes may be substituted for the service to be performed under the proposed rate.

(c) Any reply to a verified complaint seeking suspension should contain, unless already filed pursuant to §1108.1(a), information regarding tonnage of the involved commodity shipped between the involved points during the preceding 3 years by the proposing carrier and its affiliates and the rates charged therefor during the same period.

(d) A formal complaint containing an allegation that an existing rail rate is unreasonably high shall contain verified evidence upon which the Commission can base a determination with regard to maket dominance including, to the extent available, the information outlined in §1108.1(a) and (b).

(e) Upon notification of a proceeding instituted upon the Commission's own initiative to investigate whether an existing or proposed rail rate is unreasonably high, the interested carrier or carriers shall file, within 20 days from the service date of the order instituting said investigation, a verified statement containing, to the extent available and if not previously furnished by the carrier(s), evidence pertaining to market dominance, including but not limited to the information outlined in §1108.1(a) and (b). Replies, if any, directed to the question of market dominance, should be filed within 10 days of the filing date of such statement.

(f) In any proceeding involving a determination as to market dominance wherein the evidence adduced establishes the existence of one or more of the following situations, a rebuttable presumption of fact that the carrier whose rates are in issue has market dominance over the involved service, movement or traffic, will arise: (1) Where the rate in issue has been discussed or considered in proceedings before a rail carrier rate bureau acting under an agreement filed with and approved by the Commission pursuant to section 5b, or the former section 5a, of the Interstate Commerce Act; (2) Where no other carrier of any mode has handled a significant amount of the involved traffic for a least 1 year preceding the filing of the proposed rates; (3) Where other carriers of any mode have handled a significant amount of traffic but there is no evidence of actual price competition in the past 3 years; (4) Where the rate in issue exceeds the rate(s) charged by carriers listed under §1108.1(b)(1) by 25 percent or more; (5) Where the rate at issue exceeds the fully allocated cost of providing the service by 50 percent or more; (6) Where the distance between origin and destination exceeds 1,500 miles, except that when the involved movement occurs as a single-line movement, market dominance may be presumed where the distance exceeds 1,200 miles, providing, however, in either instance that when a rate is subject to a minimum weight, such minimum weight shall equal or exceed 20 net tons; and (7) Where the commodity moving under the rate in issue customarily moves in bulk shipments.

Section 15(8)(d) of the Interstate Commerce Act, as amended, requires that complaints seeking suspension of a proposed rate be verified. See 49 CFR 1100.42(f).

It is ordered, That a proceeding be, and it is hereby, instituted with the objective of promulgating the standards and procedures set forth above;

It is further ordered, That any interested person may participate in this proceeding by submitting for consideration written statements of verified facts, views, and arguments regarding the proposed requirements and procedures, including suggestions as to other presumptions which might be considered, on or before 30 days from the service date of publication of this Notice in the Federal Register; that replies to opening statments are due 20 days thereafter; that any person who wishes to participate in this proceeding and to file and receive copies of pleadings shall make that fact known by notifying the Office of Proceedings, Room 5342, Interstate Commerce Commission, Washington, D.C., 20423, on or before 10 days from the Federal Register publication date; and that no oral hearing be scheduled for the receiving of testimony unless a need therefor should later appear;

It is further ordered, That in accordance with congressional intent the recommendations of the Attorney General and of the Federal Trade Commission are solicited and will be considered in the course of establishing the procedures involved herein;

And it further ordered, That a copy of this Notice and Order be served upon railroads subject to part I of the act, and upon the Attorney General and the Office of the Secretary, Federal Trade Commission; that a copy be deposited in the Office of the Secretary, Interstate Commerce Commission, Washington, D.C. 20423, for public inspection, and that statutory notice of the institution of this proceeding be given to the general public by delivering a copy thereof to the Director, Office of the Federal Register, for publication therein.

This is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

APPENDIX B

Parties filing opening and reply statements

Air Products and Chemicals, Inc.
Allied Chemical Corporation
Aluminum Association, Inc.
Amax, Inc.
American Bakers Association
American Electric Power System
American Frozen Food Institute
American Paper Institute
American Textile Manufacturers Institute, Inc.; North Carolina Textile Manufacturers Association, Inc.; South Carolina Textile Manufacturers Association, Inc.
Amstar Corporation, Spreckels Sugar Division
Archer Daniels Midland Company
Bethlehem Steel Corporation

Board of Trade of Kansas City, Missouri
Board of Trade of the City of Chicago
Commonwealth Edison Company; Detroit Edison Company; Wisconsin Power & Light Company
Commonwealth of Pennsylvania
Consumers Power Company
Copper Development Association, Inc.
Delaware River Port Authority
Drug and Toilet Preparation Traffic Conference; Farm and Industrial Equipment Institute; National Small Shipment Traffic Conference, Inc.
E. I. DuPont de Nemours and Company
Farmland Industries, Inc.
FMC Corporation
FS Services, Inc.
GATX Corporation
General Mills, Inc.
General Refractories Company
Georgia-Alabama Textile Traffic Association; Carpet and Rug Institute; Textile Fibers and By-Products Association
Gypsum Association
Institute of Scrap Iron & Steel, Inc.
Manufacturing Chemists Association
Montana Public Service Commission
National Council of Farmer Cooperatives
National Industrial Traffic League
North Dakota Public Service Commission
Pacific Northwest Traffic League
Pennsylvania Power & Light Company
Potomac Electric Power Company
Railroads (joint presentation of eastern, southern, and western railroads)
Rubber Manufacturers Association
Southern Hardwood Traffic Association
Southwestern Utilities Group:
  Central Louisiana Electric Company; Central Power and Light Company; Gulf States Utilities Company; Houston Lighting & Power Company; System Fuels, Inc.
Sunkist Growers, Inc.
United States Department of Transportation
United States Railway Association
Wisconsin Electric Company

PARTIES FILING OPENING STATEMENTS ONLY

Agway, Inc.
Alabama Power Company; Georgia Power Company; Gulf Power Company; Mississippi Power Company
American Retail Federation
Boise Cascade Corporation
Canned Goods Shippers Conference, Inc.
Canners League of California
Certain-Teed Products Corporation

Council on Wage and Price Stability
Department of Agriculture, State of Montana
Dow Chemical Company
Federal Trade Commission
Fertilizer Institute
First Miss, Inc., of Fort Madison, Iowa
Foster Wheeler Energy Corp.
Garvey, Inc.
General Foods Corporation
Geo. A. Hormel & Co.; Oscar Mayer & Co.; John Morrell & Co.; and The Rath Packing Company
Georgia-Pacific Corporation
Glass Container Manufacturers Institute, Inc.
Grain Processing Corporation
Jones & Laughlin Steel Corporation
Middlewest Motor Freight Bureau
Motor Vehicle Manufacturers Association of the United States, Inc.
National Cotton Council and L. T. Barringer and Company
New England Grain & Feed Council
Procter & Gamble Company
Quaker Oats Company
Rochester Gas and Electric Corporation
Society of the Plastics Industry, Inc.
Stupp Corporation
Union Equity Cooperative Exchange
United States Department of Agriculture
United States Department of Defense
United States Steel Corporation
Upper Great Plains Transportation Institute
Western Fuels Association, Inc.
Westinghouse Electric Corporation
Wisconsin Association of Manufacturers and Commerce; Wisconsin Paper and Pulp Manufacturers Traffic Association; Consolidated Papers, Inc.; Mosinee Paper Corporation; Nekoosa Papers, Inc.; and Thilmany Pulp and Paper Company

PARTIES FILING REPLY STATEMENTS ONLY

Asphalt Roofing Manufacturers Association
Association of Home Appliance Manufacturers
BASF Wyandotte Corporation
Carolina Power & Light Company
Gifford-Hill and Company, Inc.
Houston Port Bureau, Inc.
National Economic Research Associates, Inc., on behalf of:
  Commonwealth Edison Company, Detroit Edison Company, Wisconsin Power & Light Company; Consumer Power Company; Pennsylvania Power & Light Company; Rochester Gas & Electric Corp.; Union Electric Company; Wisconsin Electric Power Company
National Steel Corporation
Phillips Petroleum Company
Property Owners' Committee
Wheeling Pittsburgh

APPENDIX C

Part 1109 REQUIREMENTS AND PROCEDURES RELATING TO THE RAILROAD REVITALIZATION AND REGULATORY REFORM ACT OF 1976

§1109.1 *Requirements and Procedures Relating to a Determination of Market Dominance with Regard to Rates Challenged as Unreasonably High*[1]

(a) In order that the Commission may determine whether a rail carrier proposing a rate increase possesses market dominance over the service to be rendered under a proposed rate, there shall be included in the carrier's statement notifying the Commission that it wishes to have the proposed rate considered pursuant to section 15(8)(c) of the Interstate Commerce Act, evidence upon which the Commission may base a determination with regard to market dominance, to the extent available, and including but not limited to the following information: (1) Descriptions of involved commodities and full seven-digit STCC number(s); (2) descriptions of involved points or areas and mileage(s), stated in terms of short-line mileage by rail; (3) the variable cost of the service to which the rate applies; (4) whether and to what extent the proposed rate has been discussed, considered, or approved before a rate bureau acting under an agreement filed with and approved by the Commission pursuant to section 5a or 5b of the Interstate Commerce Act; application number(s), date proposal docketed with rate bureau, and final disposition of proposal and date thereof; and the share of the market, or an estimate thereof, presently held by such participating carriers; (5) tonnage of the involved traffic transported between the involved points or areas by the proponent carrier and its affiliates during the preceding year, and the rates charged therefor during the same time period; (6) names of any known originating for-hire carriers of any mode offering interchangeable service between the involved points or areas, the tonnage transported, and the rates charged therefor during the preceding year; (7) the extent to which the proponent rail carrier has taken general increases approved by the Commission in the preceding 2 years.

(b) In all proceedings involving a request for suspension of a proposed rate on the ground that it is unreasonably high there shall be included in the verified complaint seeking suspension of the schedule containing the proposed rate,[2] evidence upon which the Commission may base a determination with regard to market dominance, including the information outlined in subparagraphs (a)(1)-(7), to the extent available and not previously furnished by the rail carrier, and including but not limited to the following information: (1) Characteristics of the involved traffic or movement affecting the ease or difficulty with which transportation services of other carriers or modes may be substituted for the service to be performed under the rate in issue; (2) tonnage of the involved traffic transported between the involved points or areas by any known for-hire carriers, other than those in subparagraph (a)(5), during the preceding year, and the rates charged therefor during the same time period; (3) any other relevant information.

(c) Any reply to a verified complaint seeking suspension should contain any information required by §1109.1(a) and (b), to the extent not previously furnished by complainant. Whether or not a reply to a verified complaint seeking suspension is filed, the proponent rail carrier on or before the due date for filing a reply, must provide the Commission with the information required by §1109.1(a) to the extent not previously submitted by another party.

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[1] As used in this section, the term rates includes fares and charges.

[2] Section 15(8)(d) of the Interstate Commerce Act as amended requires that complaints seeking suspension of a proposed rate be verified. See 49 CFR 1100.42(f).

(d) A formal complaint containing an allegation that an existing rail rate is unreasonably high shall contain verified evidence upon which the Commission may base a determination with regard to market dominance, including, to the extent available, the information outlined in §1109.1(a) and (b). The answer to a formal complaint shall be verified and shall contain the information outlined in §1109.1(a) to the extent not previously furnished.

(e) Upon notification of a proceeding instituted upon the Commission's own initiative to investigate whether an existing or proposed rate is unreasonably high, the interested carrier or carriers shall file, within 20 days from the service date of the order instituting said investigation, a verified statement containing, to the extent available and if not previously furnished by the carrier(s), evidence upon which a market dominance determination may be based, including but not limited to the information outlined in §1109.1(a) and (b). Replies, if any, directed to the issue of market dominance, should be filed within 20 days of the due date for the filing of the carrier statement.

(f) In a proceeding involving a determination as to market dominance wherein the evidence adduced establishes that the rate in issue has been discussed, considered, or approved under a rate bureau agreement filed with the Commission pursuant to section 5a or 5b of the Interstate Commerce Act, a rebuttable presumption will arise that a carrier participating in the rate or in such discussion or consideration does not provide effective competition to the proponent rail carrier for the involved traffic or movement.

(g) In a proceeding involving a determination as to market dominance wherein the evidence adduced establishes one of the following situations, a rebuttable presumption that the carrier whose rate is in issue has market dominance over the involved traffic or movement will arise: (1) Where the proponent carrier has handled 70 percent or more of the involved traffic or movement during the preceding year; the market share of the proponent will be deemed to include the share of any affiliates, and of any carriers with whom the proponent carrier has discussed, considered, or approved the rate in issue; (2) where the rate in issue exceeds the variable cost of providing the service by 80 percent or more; and, (3) where affected shippers or consignees have made a substantial investment in rail-related equipment which prevents or makes impractical the use of another carrier or mode.

APPENDIX D

Legislative history of market dominance

Since the Transportation Act of 1958, there has been discussion of Interstate Commerce Commission ratemaking reform. The first proposal approved by either House of Congress was contained in the Surface Transportation Act of 1974[1] which was passed by the House in October 1974, but was never taken up by the Senate. Section 306 of that act, in addition to tightening standards for Commission suspension of rate changes, would have removed the Commission's suspension power within a 7-percent up or 7-percent down "no-suspend zone."

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[1] H.R. 5385, 23d Cong., 2d Sess. (1974).

When DOT offered its proposed Rail Revitalization Act of 1975 it again proposed a "no-suspend zone" as the key means of affording rate flexibility to the railroads. This version of the "no-suspend zone" would have allowed, without risk of suspension, a 7-percent increase or decrease in the first year, 12 percent the second year, and 15 percent each year thereafter.

This proposed regulatory reform was viewed as a way of according rate flexibility to the railroads—a policy which would have various benefits in the eyes of various proponents. To DOT and the Administration sponsors of the "no-suspend zone" provision, rate flexibility would lead to increased competition and was "specifically designed to cause a reduction in rates which are too high and are inequitable to shippers and consumers." The railroads also valued rate flexibility, but for a different reason. According to Stephen Ailes, president of the Association of American Railroads (AAR), rate regulation holds rates down and costs the railroads the additional revenues which would become available given rate flexibility. Secretary of Transportation Coleman took the middle ground by finding that rate flexibility would both raise and lower rates. "The ratemaking provisions of the [proposed DOT] Act will cause a reduction of rates that are too high and unfair to shippers, and will cause an increase of rates that are too low and not compensatory to carriers." Thus, it is evident from this testimony that rate flexibility has meant many different things to different people.

Although the DOT bill was introduced in the Senate, it appears that the Subcommittee on Surface Transportation of the Senate Commerce Committee rejected the Administration's concept of rate flexibility embodied in a no-suspend zone. Instead, S.2265 which was introduced by Senator Hartke, the Chairman of the Surface Transportation Subcommittee, and which formed the basis of the Senate version of the final bill, contained a "market dominance" provision which was a completely novel and creative approach. In this provision Commission regulation of maximum rates was limited to situations where the carrier had "market dominance." In this initial S.2265 draft market dominance was defined as follows:

> "Market dominance" means with respect to a carrier subject to this Act, the ability to charge as a consequence of the absence of effective competition, from the carriers or from other modes of transportation, a rate that unreasonably exceeds the cost of providing the service involved.

H.R. 7681, 94th Cong., 2d Sess. (1975) (the "DOT Bill").

DOT press release dated May 19, 1975 to announce that the President had sent the Administration's "Railroad Revitalization Act" to Congress.

Hearings on Legislation Relating to Rail Passenger Service Before the Subcommittee on Surface Transportation of the Committee on Commerce of the United States Senate, 94th Cong., 1st Sess., Part 4 at 291-92 (1975) (hereinafter cited as Senate Hearings).

Statement by U.S. Secretary of Transportation, William T. Coleman, Jr., on the Railroad Revitalization Act at the White House News Conference, Washington, D.C., Monday, May 19, 1975.

It has been suggested that Canadian provisions limiting rate regulation to captive shipper situations might be a precedent for the Senate provision, but there is no mention of the Canadian legislation in the legislative history, and the Canadian captive shippers concept seems too far removed from market dominance for the Candian experience to have any direct bearing on the definition and application of the market dominance concept.

S.2265, 94th Cong., 1st Sess. §103 (a)(5)(B)(ii)(1975).

AAR, while favoring the rate flexibility contemplated in the Administration's no-suspend zone proposal, strongly opposed the market dominance concept on the ground that it would lead to burdensome litigation and would "establish an upper limit on rate adjustment flexibility."[8]

DOT continued to advocate its no-suspend zone rate flexibility as a way to avoid "delays costs, uncertainties and mistakes."[9] Nevertheless, DOT found the market dominance concept a meritorious and important alternative, so long as there was involvement of the "Department of Transportation in the process for determining the standards for market dominance in order to counterbalance the tendency of the Commission to see monopoly where none exists."[10]

ICC comments on the original market dominance provision reflected general approval of the concept that maximum rate regulation is not necessary where competitive market forces are sufficient to protect the public from unreasonably high rates. Serious questions, however, were raised about the workability of the provision as drafted. In particular, the Commission was concerned that the analogy to antitrust concepts could lead to a great deal of highly complex antitrust-type litigation. In addition, the Commission was concerned that the definition of market dominance cover oligopoly as well as pure monopoly situations.[11]

The Commerce Committee and the staff redrafted the market dominance provision into the form in which it appeared in section 103 of S.2718 reported by the Committee to the Senate on November 26, 1975.[12] This version continued to reject

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[8] Statement of Stephen Ailes, Senate Hearings, Part 4, at 1002.

[9] Statement of Secretary Coleman, Senate Hearings, Part 4, at 1017.

[10] *Id.*, at 1917-18. See also Senate Hearings, Part 5, at 1745-46.

[11] Statement of The Honorable George M. Stafford, Chairman of the ICC, Senate Hearings, Part 4, 974-76.

[12] S. Rep. No. 94-499, 94th Cong., 1st Sess. (1975). The market dominance provision in section 103 of S.2718 was reported as follows:

> (5)(A) *** Notwithstanding any other provisions of this part, no rate shall be found to be unjust and unreasonable, on the ground that such rate exceeds a just or reasonable maximum for the service rendered or to be rendered unless the Commission has first found that the proponent carrier has market dominance over such service. A finding that a carrier has market dominance over a service shall not create a presumption that the rate or rates for such service exceed a just and reasonable maximum ***.
>
> (B) As used in this paragraph, the term- (i) "market dominance" refers to an absence of effective competition for the traffic to which a rate applies from other carriers or modes of transportation. Market dominance shall be presumed to exist if, prior to or after the publication of a rate, no shipment (except an occasional or emergency shipment) of the traffic to which the rate applies has moved by any carrier or mode of transportation, other than by the proponent carrier during the 12 months preceding the commencement of the Commission's proceeding to determine or investigate the lawfulness of the rate as a result of the relationship of the applicable rate (or cost of serivce in the case of a private carrier) of any other carrier or of any other mode (including exempt and private carriers) of transportation, to the rate of the proponent carrier, and (ii) "rate" means any rate or charge for the transportation of persons or property.
>
> (C) Within 240 days after the date of enactment of the Rail Services Act of 1975, the Commission shall establish, by rule, standards and procedures for determining, in accordance with section 15(8) of this part, whether and when a carrier possesses market dominance over a service rendered or to be rendered at a particular rate or rates. Such rules shall be designed to provide for a practical determination without administrative delay. The

(footnote continued on next page)

the DOT concept of rate flexibility embodied in the no-suspend zone proposal, and responded to ICC concerns by defining market dominance in terms of "an absence of effective competition for the traffic to which a rate applies from other carriers or modes of transportation," and by making clear that it is the proponent carrier or carriers proposing the rate which must have market dominance.

In addition, section 103 provided specifically for market dominance determinations to be made in accordance with rules "designed to provide for a practical administrative determination without delay." These changes abated in substantial part the ICC's previously expressed concerns regarding its ability to protect the public in oligopoly situations and the danger of becoming bogged down in antitrust-type litigation. The Senate Committee did not respond to the DOT request that it be given a direct role in formulation of market dominance regulations. Instead, it left standing the language of S.2265 which provided an advisory role for the FTC and Justice Department, Antitrust Division, but not for DOT.[13]

The Senate Commerce Committee Report indicates that the Committee favored balancing the railroads' need for rate flexiblity with protection for shipper interests. In its discussion of the market dominance concept the report states:

> Commission regulation of maximum rate levels will apply only when the railroad or railroads publishing a rate increase set [sic] market dominance over the service involved. Otherwise, in truly competitive markets the railroads will have freedom, absent discrimination and prejudice, to raise prices as they choose in order to maximize revenues.
>
> The key to this new provision is in the definition of market dominance. Market dominance is defined in terms of the lack of effective competition avoids the problems of defining monopoly power which have arisen under the antritrust laws. Under this definition the publishing carrier need not have monopoly power. Rather

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(footnote 12 continued)

Commission shall solicit and consider the recommendations of the Attorney General and of the Federal Trade Commission in the course of establishing such rules.

(b) Section 15 of the Interstate Commerce Act (49 U.S.C. 15) is amended by renumbering paragraphs (8) through (14) thereof as paragraphs (9) through (15) thereof, respectively, and by inserting therein a new paragraph (8) as follows:

(8) Whenever a rate is challenged as being unreasonably high, the Commission shall, upon complaint or upon its own initiative and within 90 days after the commencement of a proceeding to investigate the lawfulness of such rate, determine whether the carrier proposing such rate has market dominance, within the meaning of section 1(5)(B)(i) of this part, over the service to which such rate applies. If the Commission finds that a carrier does not have such market dominance, such finding shall be determinative in all additional or other proceedings concerning such rate or service, unless (A) such finding is modified or set aside by the Commission, or (B) such finding is set aside by a court of competent jurisdiction. Nothing in this paragraph limits the Commission's power to suspend a rate pursuant to paragraph 7 of this section, except that if the Commission has found that a carrier does not have such market dominance over the service to which a rate applies, the Commission may not suspend any increases in such rate on the ground that such rate as increased exceeds a just or reasonable maximum for such service, unless the Commission specifically modifies or sets aside its prior determination concerning market dominance over the service to which such rate applies.

[13] It should also be noted that this Senate Committee draft added a presumption to the market dominance definition. Without binding the Commission's hand in any other fashion, the presumption called for a market dominance finding when no competitive carrier had moved the traffic in 1 preceding year.

the test will be whether the market itself is sufficiently competitive to insure just and reasonable rates. Thus, the Commission will be able to regulate maximum rates in oligopoly or concentrated markets as well as in monopoly markets. Lengthy antitrust-type litigation will be avoided by virtue of the Commission's authority to adopt rules of practical application which will identify markets in which dominance exists.

The market dominance test is not designed to be an ultimate regulatory standard. Instead, it is designed as a threshold test to direct the Commission's regulatory activities into areas where the public interest needs protection, while deregulating and giving flexibility to the railroads in areas where effective competition from other railroads and other modes can supplant the need for maximum price regulation.[14]

In addition, the report states that "ratemaking revisions to assist the railroads must continue protections for the public interest as a whole,"[15] and that the Commission will continue to be able to regulate maximum rate tariffs unless there is effective competition which insures that rates do not exceed a just and reasonable level.[16]

There are, to be sure, references to assisting the railroads by relaxing rate regulation. For instance the report talks generally about the railroads need for more revenue:

> *** If railroads are to increase their revenues and attract the resources necessary to revitalize the industry, they must be able to raise their rates in a timely fashion, free from regulation in markets sufficiently competitive to prevent abuses of monopoly power ***. [*Id.*, at 9-10.]

In particular, there seemed to be a concern that railroads be relieved from regulatorily imposed cross-subsidation sufficiently to allow them to raise rates to a minimum variabe cost level:

> *** The Commission has, on the one hand, frequently used the power it possesses to hold down rates, often to protect the movement of commodities that would otherwise be isolated geographically. This "cross subsidation" policy has been an important part of public transportation policy since the beginning of Commission regulation. Nevertheless, changes in the economic strength of the railroads and their ability to cross subsidize seem to require some changes in that policy. [*Id.*, at 10-11.]

Committee action in the House of Representatives resulted in a House bill which was closer to the position of the Administration. Initially, in addition to DOT's proposed "Railroad Revitalization Act," Congressman Brock Adams of Washington introduced in H.R. 6351, a cut-down version of the Surface Transportation Act which had been passed the year before.

In hearings before the Subcommittee on Transportation and Commerce of the Committee on Interstate and Foreign Commerce of the House of Representatives, DOT and the railroads favored the no-suspend zone, rate flexibility approach, which the ICC strongly opposed.[17]

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[14] *Id.*, at 47.

[15] *Id.*, at 14.

[16] *Id.*, at 46.

[17] Statement of the Honorable William T. Coleman, Secretary of Transportation, in hearings before the Subcommittee on Transportation and Commerce of the Committee on Foreign Commerce, the House of Representatives on Railroad Revitalization, Serial No. 94-38, 94th Cong., 1st Sess. 1975, at 151-157; Statement of Stephen Ailes, president of AAR, *Id.*, at 562-64, and Statement of The Honorable George M. Stafford, Chairman of the ICC, *Id.*, at 240-52

After the hearings the subcommittee staff prepared a new bill, H.R. 9802, which was introduced by the Subcommittee Chairman, Congressman Rooney, on September 23, 1975. This new bill adopted the no-suspend zone approach of the Administration, but limited the no-suspend zone to 7 percent a year during a 3-year experiment.

Subsequently during the subcommittee mark-up on the bill a market dominance provision was added by the subcommittee staff. This provision was further refined by amendment offered by Congressman Skubitz, the ranking minority member on the subcommittee. This subcommittee version appears in section 301(g) and (h) of H.R. 10979, a "clean bill" reported to the Full Committee on December 3, 1975, by Chairman Rooney and the members of the Subcommittee following extensive work sessions marking up H.R. 9802."[illegible]

In this House subcommittee provision, as in the Senate provision, the Commission was required to find market dominance before finding a rate too high and the determination was to be made in accordance with rules to be adopted by the Commission. Nevertheless, the Senate definition of market dominance in terms of lack of effective competition was replaced by geographic and market share definitions. Moreover, the Commission was not given full discretion in promulgating rules to implement the provisions. Rather the rules were to be made "in conjunction" with DOT.

When the full Interstate and Foreign Commerce Committee held mark-up sessions on H.R. 10979, the market dominance provision was further amended in accordance with an amendment introduced by Representative Dingell. This amendment conformed the House provision to the Senate provision by defining market dominance as "an absence of effective competition from the carriers or modes of competition." In addition, the requirement that Commission rules be made in conjunction with DOT

[illegible]Subsections (g) and (h) of section 301 of H.R. 10975, as introduced on December 3, 1975, read as follows:

> (g) Following the promulgation and review of the initial standards established pursuant to subdivision (h), no rate shall be found unjust or unreasonable on the ground that it is too high unless the Commission determines that the common carrier by railroad charging the rate has market dominance.
>
> (h) Within 180 days after the date of enactment of this paragraph, and from time to time thereafter as may be necessary, the Commission, in conjunction with the Secretary, shall establish detailed standards and procedures for determining whether and when a common carrier by railroad possesses market dominance over a particular rate or rates. In establishing such standards, the Commission and the Secretary shall define market dominance as any situation in which (i) in a particular geographical area, there are not at least two competing common carriers by railroad, or a common carrier by railroad and an alternate mode of transportation which both compete for the business of all shippers in such area; or (ii) with respect to any single commodity or type of goods, there are not at least two competing common carriers by railroad, or a common carrier by railroad and an alternate mode of transportation which provides transportation for such commodity or type of goods in a reasonably effective and competitive fashion.

In establishing such standards, the Commission and the Secretary shall also consider such factors as they find relevant, including: the size and assets of involved carriers; the transportation characteristics of the commodity or commodities involved; the degree of participation of regulated and unregulated carriers of the same and different modes of transportation in the services involved; the ease of entry of potential competitors; and the level of profit obtained in providing the particular transportation service involved.

was dropped and the Commission was only required to consider the recommendations of the Secretary of DOT, the Attorney General, and the Federal Trade Commission. Finally, the Dingell revision contained the important language from the Senate Bill to the effect that the Commission rules implementing the market dominance provision "shall be designed to provide for a practical determination without administrative delay."[19]

H.R. 10979 was passed by the House on December 17, 1975, without any further amendment to the market dominance provision. It was then immediately considered by a Senate-House Conference.

In this first Conference which made its report on December 19, 1975, the Senate version of ratemaking reform largely prevailed:

> *Conference substitute*
>
> The conference substitute follows the Senate bill except that—
>
> (1) the conferees eliminated the provisions relating to a presumption of market dominance;
>
> (2) the conferees adopted a modified version of the House provision on rate zone freedom. The conference substitute provides that a rate may be increased or decreased up to 7 percent (for 2 years) without being suspended unless the rate is unlawful or predatory or the carrier has market dominance over the rate.
>
> (3) the conferees adopted a modified version of the House provision which requires any person seeking suspension to file an affidavit from which on its face, it appears that the complainant will be injured, and there are reasonable grounds for presuming that the rate will be found unlawful.[20]

The bill as reported in the December 19 Conference Report was approved by both Houses on December 19, 1975, without any change in the market dominance provision. Nevertheless, the Christmas recess and a veto threat kept the bill from being enrolled and sent to the President.

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[19] The market dominance provision as amended by Representative Dingell reads as follows:

> (h) Following the promulgation and review of the initial standards established pursuant to subdivision (i), no rate shall be found unjust or unreasonable on the ground that it is too high unless the Commission determines that the common carrier by railroad charging the rate has market dominance. As used in this paragraph, the term "market dominance" refers to an absence of effective competition from other carriers or modes of competition. Market dominance shall be presumed in any situation in which (i) in any geographical market there are not at least 2 competing rail carriers or a rail carrier and an alternative mode of transportation both of which compete for the business in the area, or (ii) with respect to any single commodity or type of goods there is the absence of competition between the rail carriers for transport of that commodity, or where there is only one rail carrier, the absence of a competing mode which in fact provides transportation for that commodity in a reasonably effective and competitive fashion.
>
> (i) Within 240 days after the date of enactment of the Railroad Revitalization and Regulatory Reform Act of 1975, the Commission shall establish, by rule, standards and procedures for determining whether and when a carrier possesses market dominance over a service rendered or to be rendered at a particular rate or rates. Such rule shall be designed to provide for a practical determination without administrative delay. The Commission shall solicit and consider the recommendations of the Secretary, of the Attorney General, and of the Federal Trade Commission in the course of establishing such rules.

[20] H.R. Rep. No. 94-768, 94th Cong., 1st Sess. (1975), at 122.

In January 1976 the conferees met and worked out compromises, particularly in the area of funding, which made the bill acceptable to the President. Again the market dominance provision remained unchanged, but the new Report of the Committees of Conference on S.2718,[21] elaborated on market dominance provision and specifically instructed the Commission to use a presumption relating to rate bureaus:

> *Conference substitute*
>
> Inasmuch as the new section 5b permits the consideration of rates free from the antitrust restrictions which would otherwise control competitive markets, the Committee of Conference intends that that there will be presumed to be an absence of effective competition between railroads with respect to any rate discussed or considered under an agreement approved by the Commission pursuant to new section 5b of the Interstate Commerce Act. ***

The new Conference Report and Compromise Bill was approved by both houses and sent to the President, who signed it into law on February 5, 1976, as Public Law 94-210.

APPENDIX E

INTERSTATE COMMERCE COMMISSION

FILING OF RAIL TARIFFS OF CHANGED RATES PURSUANT TO THE RAILROAD REVITALIZATION AND REGULATORY REFORM ACT OF 1976

February 13, 1976

NOTICE:

On February 5, 1976, Public Law 94-210, 90 Stat. 31, entitled, "Railroad Revitalization and Regulatory Reform Act of 1976" was enacted. Section 202(e) of the statute establishes a new paragraph (8) to section 15 of the Interstate Commerce Act applicable to rail carriers. As here pertinent, the newly enacted section 15(8) limits the Commission's power to suspend proposed rate changes filed within 2 years of the date of enactment of this statute, if such rate changes meet specified statutory criteria. It is further provided therein that common carriers by railroad must notify the Commission when they wish to have a rate proposal considered pursuant to this subsection.

To satisfy the requirements of the above-described statute and to facilitate the implementation thereof, any common carrier by railroad (or its tariff publishing agent) which desires to have any proposed rate change[1] considered by the Commission pursuant to the "7 per centum increase or decrease" provisions of the Railroad Revitalization and Regulatory Reform Act of 1976 (section 15(8)(b) and 15(8)(c) of the Interstate Commerce Act, as amended), shall notify the Commission upon the carrier's (or publisher's) filing of the proposed tariff or schedule containing said changes. The notification to the Commission shall include (1) the rate(s) in effect on

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[21] Rep. No. 94-781, 94th Cong., 2d Sess., January 23, 1976.

[1] The change must be one which is not of general applicability and the aggregate of the increase or decrease may not exceed 7 per centum of the rate in effect on January 1, 1976 to come within this subsection in connection with rates filed within 365 days of enactment. Thereafter, during the next year, the aggregate increase or decrease may not exceed 7 per centum of the rate in effect on January 1, 1977. See 15(8)(b) and (c), as amended.

January 1, 1976;[4] and (2) verification that the information contained in said notice has been furnished to each subscriber of the tariff or schedule at the time said subscriber is furnished its copies of the publication as provided by the rules adopted in docket No. 35613.

ROBERT L. OSWALD,
Secretary.

APPENDIX F

The following sections of the "Railroad Revitalization and Regulatory Reform Act of 1976" introduce and implement the market dominance concept:

Section 202(b). Section 1(5) of the Interstate Commerce Act (49 U.S.C. 1(5)) *** is amended by adding at the end thereof the following new subdivisions:

(b) Each rate for any service rendered or to be rendered in the transportation of persons or property by any common carrier by railroad subject to this part shall be just and reasonable. A rate that is unjust or unreasonable is prohibited and unlawful ***. Notwithstanding any other provision of this part, no rate shall be found to be unjust or unreasonable or not shown to be just and reasonable, on the ground that such rate exceeds a just or reasonable maximum for the service rendered or to be rendered, unless the Commission has first found that the proponent carrier has market dominance over such service. A finding that a carrier has market dominance over a service shall not create a presumption that the rate or rates for such service exceed a just and reasonable maximum ***.

(c) As used in this part, the term—

(i) "market dominance" refers to an absence of effective competition from other carriers or modes of transportation, for the traffic or movement to which a rate applies; and

(ii) "rate" means any rate or charge for the transportation of persons or property.

(d) Within 240 days after the date of enactment of this subdivision, the Commission shall establish, by rule, standards and procedures for determining, in accordance with section 15(9) of this part, whether and when a carrier possesses market dominance over a service rendered or to be rendered at a particular rate or rates. Such rules shall be designed to provide for a practical determination without administrative delay. The Commission shall solicit and consider the recommendations of the Attorney General and of the Federal Trade Commission in the course of establishing such rules."

Section 202(c). Section 15 of the Interstate Commerce Act (49 U.S.C. 15) is amended by redesignating paragraphs (8) through (14) thereof as paragraphs (10) through (16) thereof, respectively, and by inserting therein a new paragraph (9) as follows:

(9) Following promulgation of standards under section 1(5)(d) of this part, whenever a rate of a common carrier by railroad subject to this part is challenged as being unreasonably high the Commission shall, upon complaint or upon its own initiative and within 90 days after the commencement of a proceeding to investigate the lawfulness of such rate, determine whether the carrier proposing such rate has market dominance within the meaning of section 1(5)(c)(i) of this part, over the service to which such rate applies. If the Commission finds that such a carrier does not have

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[4] Any rates proposed to become effective more than 365 days after enactment of P.L. 94-210 shall include a statement of the rate(s) in effect on January 1, 1977.

such market dominance, such finding shall be determinative in all additional or other proceedings under this Act concerning such rate or service, unless (a) such finding is modified or set aside by the Commission, or (b) such finding is set aside by a court of competent jurisdiction. Nothing in this paragraph shall limit the Commission's power to suspend a rate pursuant to this section, except that if the Commission has found that a carrier does not have such market dominance over the service to which a rate applies, the Commission may not suspend any increase in such rate on the ground that such rate as increased exceeds a just or reasonable maximum for such service, unless the Commission specifically modifies or sets aside its prior determination concerning market dominance over the service to which such rate applies.

Section 202(e). Section 15 of the Interstate Commerce Act (49 U.S.C. 15), as amended by this act, is further amended—

***(2) by inserting a new paragraph (8) as follows:

(b)(i) in the case of a rate increase, a rate may not be suspended on the ground that it exceeds a just and reasonable level if the rate is within a limit specified in subdivision (c), except that such a rate change may be suspended under any provision of section 2, 3, or 4 of this part or, following promulgation of standards and procedures under section 1(5)(d) of this part, if the carrier is found to have market dominance, within the meaning of section 1(5)(c)(i) of this part, over the service to which such rate increase applies;

(c) The limitations upon the Commission's power to suspend rate changes set forth in subdivisions (b)(i) and (ii) apply only to rate changes which are not of general applicability to all or substantially all classes of traffic and only if—

(i) the rate increase or decrease is filed within 2 years after the date of the enactment of this subdivision;

(ii) the common carrier by railroad notifies the Commission that it wishes to have the rate considered pursuant to this subdivision;

(iii) the aggregate of the increases or decreases in any rate filed pursuant to clauses (i) and (ii) of this subdivision within the first 365 days following such date of enactment is not more than 7 per centum of the rate in effect on January 1, 1976; and

(iv) the aggregate of the increases or decreases for any rate filed pursuant to clauses (i) and (ii) of this subdivision within the second 365-day period following such date of enactment is not more than 7 per centum of the rate in effect on January 1, 1977.

(d) The Commission may not suspend a rate under this paragraph unless it appears from specific facts shown by the verified complaint of any person that—

(i) without suspension the proposed rate change will cause substantial injury to the complainant or the party represented by such complaint; and

(ii) it is likely that such complainant will prevail on the merits.

The burden of proof shall be upon the complainant to establish the matters set forth in clauses (i) and (ii) of this subdivision. Nothing in this paragraph shall be construed as establishing a presumption that any rate increase or decrease in excess of the limits set forth in clauses (iii) or (iv) of subdivision (c) is unlawful or should be suspended.

Section 202(f). Nothing in the amendments made by this section shall be construed—

(1) to modify the application of section 2, 3, or 4 of the Interstate Commerce Act (49 U.S.C. 2, 3, or 4) in determining the lawfulness of any rate or practice;

(2) to make lawful any competitive practice which is unfair, destructive, predatory, or otherwise undermines competition which is necessary in the public interest;

(3) to affect the existing law or the authority of the Commission with respect to rate relationships between ports; or

(4) to affect the authority and responsibility of the Commission to guarantee the equalization of rates within the same port.

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